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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION COMPANY
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA,
Respondent,

and

CALIFORNIA DEPARTMENT OF TRANSPORTATION,
Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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December 23, 1983

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QUESTIONS PRESENTED

I.

Must a party seek immediate review in this Court of a state court decision containing a federal issue arguably ripe for review, when that same issue has already been presented by the same parties to a federal district court for determination, and ongoing state proceedings may dispose of the state dispute on nonfederal grounds?

II.

Must not the res judicata rule give way to a conflicting and preemptive federal statute which directly derives from Congress' constitutional power to regulate interstate commerce?

III.

Where the federal constitutional issue was not fully litigated and finally determined in the state court, can a federal court invoke the res judicata doctrine in defiance of the settled rule allowing a party to litigate that issue in a new, related cause of action?

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

Petitioner's parent company is Southern Pacific Company. The partially owned subsidiaries and affiliates of the petitioner are:

St. Louis Southwestern Railway Co.
The Ogden Union Railway & Depot Co.
Portland Traction Company
Portland Terminal Railroad Co.
Sunset Railway Company
Central California Traction Company
Trailer Train Company

The wholly and partially-owned subsidiaries and affiliates of St. Louis Southwestern Railway Co. are:

Alton & Southern Ry. Co.
Arkansas & Memphis Ry. Bridge & Terminal Co.
Dallas Terminal Ry. & Union Depot Co.
St. Louis Southern Ry. Co. of Texas
Southern Illinois & Missouri Bridge Co.
Southwestern Transportation Co.
Terminal R.R. Association of St. Louis
Glascar Inc.
Main Street Warehouse Company
The Southwestern Town Lot Corp.
Kansas City Terminal Railway Co.
Trailer Train Company

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Southern Pacific Transportation Company respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 27, 1983.

OPINIONS BELOW

The opinion of the court of appeals is reported at 716 F.2d 1285 (9th Cir. 1983) and appears in the Appendix at 1a. The opinion and judgment of the United States District Court for the Northern District of California issued August 9, 1982, which have not been reported, appear in the Appendix at 12a and 31a, respectively. An amendment to the order of the district court appears in the Appendix at 19a. The district court's order denying SP's motion for an injunction pending appeal appears in the Appendix at 21a. The ninth circuit's order denying SP's emergency motion for an injunction appears in the Appendix at 23a.

JURISDICTIONAL STATEMENT

The mandate of the United States Court of Appeals for the Ninth Circuit was entered on October 24, 1983. App. at 29a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are set forth in the Appendix commencing at 32a.

United States Constitution article I, section 8, clause 3.

Interstate Commerce Act, as amended by the Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895, 49 U.S.C. §§10101a, 10501, 11501.

California Public Utilities Code §§1732, 1756.

STATEMENT OF THE CASE

Petitioner Southern Pacific Transportation Company ("SP") brought suit in the United States District Court for the Northern District of California against respondent Public Utilities Commission of California ("PUC") and intervening respondent California Department of Transportation ("Caltrans") on June 15, 1982, to enjoin the PUC from enforcing its order of June 2, 1982, directing SP to build new commuter stations, file tariffs, and institute intrastate passenger commuter train service.

The related proceedings before the PUC and the Interstate Commerce Commission ("ICC") and in the state courts are described in the "Statement of the Case" filed December 13, 1982, in No. 83-985, wherein SP has appealed from two decisions of the Supreme Court of California declining to review subsequent PUC orders.[1]

[1] The decisions and orders in these related cases are included in the appendix to SP's jurisdictional statement in No. 83-985, hereafter referred to as "Appeal App."

The appeals in No. 83-895, and this petition for writ of certiorari involve different facets of a continuing controversy and the same primary parties.

A. The Factual Background Of This Case

There is no dispute as to the essential facts. On May 18, 1978, the County of Los Angeles ("County") and Caltrans petitioned the PUC for an order directing SP to start commuter passenger train service on a 66-mile segment of SP's Coast main line between Oxnard, CA and Los Angeles, CA. On June 3, 1980, the PUC ruled in favor of the requested service, but its implementing order was stayed by the timely filing by SP of an application for rehearing. Decision 91847, 3 Cal.PUC 2d 679, Appeal App. at 3a. On September 3, 1980, the PUC granted partial rehearing and reopened for the taking of additional evidence, thereby continuing the stay. Decision No. 92230 (unreported), Appeal App. at 66a.

On October 3, 1980, SP filed with the Supreme Court of California a petition for writ of review of those issues in Decision 91847 that were reaffirmed in the September order. *Southern Pacific Transportation Company v. Public Utilities Commission*, S.F. No. 24220. Specifically, SP appealed to the California supreme court on the following issues: (1) whether the requested short-haul passenger rail service was within the scope of SP's dedication and (2) whether the PUC could ignore the offer of Greyhound Lines, Inc. to provide alternative bus transportation in making its findings of public convenience and necessity for the rail service.

Section 1756 of the California Public Utilities Code required SP to appeal any issues not reheard by the PUC within 30 days of the denial of rehearing.[2] However, because SP

[2] Section 1756 provides:

"Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined."

believed it likely that there would be further appeals after the rehearings, SP asked the California supreme court to stay any consideration of its petition until the reopened hearings were completed. The court made no written response but did not act.

The PUC conducted further hearings during October and November, 1980. Thereafter, the County decided that the trains would be contrary to the interests of its citizens and withdrew. Caltrans persisted, offering to pay the train deficits from its budget. In two decisions dated April 7, 1981, the PUC significantly modified its earlier findings but still required SP to institute the train service. Decision 92862 (unreported), Appeal App. at 73a and Decision 92863, 5 Cal.PUC 2d 773, Appeal App. at 82a.

On May 7, 1981, SP applied to the PUC for rehearing of both decisions and for a stay of outstanding orders. On May 22, 1981, the PUC stayed "pending further review of this matter" all of the provisions of its orders directed at SP except for a requirement that SP and Caltrans negotiate a contract to provide commuter service. Decision 93118 (unreported), Appeal App. at 100a. On June 16, 1981, the PUC again modified its findings significantly by increasing the costs which Caltrans would have to pay, but it affirmed its conclusion that the commuter service should be started. It did, however, continue the stay. Decision No. 93211 (unreported) Appeal App. at 102a.[3]

Because SP believed that the PUC's findings on the public convenience and necessity for the commute trains were incorrect in its April 7 and May 22 orders, on July 16, 1981, SP filed a second petition for writ of review in the California supreme court, again pursuant to Cal. P.U. Code §1756. *Southern Pacific Transportation Company v. Public Utilities Commission*, S.F. No. 24316.[4] That petition raised the following issues:

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[3] Caltrans petitioned for rehearing of the new compensation requirements, claiming they exceeded Caltrans' ability to pay, but its petition was denied by the PUC on August 4, 1981. Decision 93391 (unreported), App. at 43a. Caltrans did not appeal.

[4] SP's petition for writ of review appears in the Appendix at page 44a. The PUC's answer filed August 14, 1981, appears in the Appendix at page 59a. SP's reply filed September 3, 1981, appears in the Appendix at page 78a.

(1) whether the PUC erred in reaffirming its finding of public convenience and necessity in the face of the County's repudiation of the service and (2) whether the PUC denied SP due process in refusing to consider additional evidence showing that the federal funding that Caltrans anticipated receiving was no longer available.

Notwithstanding its pending state court challenges to the PUC orders, SP offered to run the commuter service for Caltrans if Caltrans would provide capital funding for certain track and facility improvements needed to avoid disruption to SP's existing business and if Caltrans would pay adequate compensation so that the commute trains would be operated as a for-profit, and not a profitless, service. This Caltrans refused to do. Caltrans also refused to compensate SP in accordance with the requirements established in the PUC's June 16, 1981, order. Instead, Caltrans requested the PUC to lift its stay and to order the commuter service into effect, leaving the parties to resolve their dispute over compensation *after* the service had started. The PUC did so on June 2, 1982. Decision 82-06-045 (unreported), Appeal App. at 115a ("June 2 Order").

All previous effective orders directed to SP had been to negotiate; the June 2 Order was different: it laid down a timetable for constructing stations, filing tariffs, and starting up train service. Because that order asserted the power to force the start-up of a new commuter rail service, it represented a serious incursion into the rights conferred upon SP by the Staggers Rail Act of 1980.

B. The Statutory Background Of This Case

The Staggers Rail Act of 1980, PL 96-448, 94 Stat. 1895, effective October 1, 1980 ("Staggers Act"), proposed the revitalization of an ailing railroad industry by lessening regulation and thereby allowing the railroads to price their services in response to market forces. The new rail transportation policy was to allow "to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail . . ." 49 U.S.C. §10101a.

In order to prevent state regulatory commissions from using state police powers to require profitless local services, Section 214[5] of the Staggers Act preempted states from regulating intrastate rail transportation unless they are certified by the ICC under the Staggers Act certification procedures. The Conference Report states:

> "The conferees' intent is to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals. Accordingly, the Act preempts state authority over rail rates, classifications, rules and practices. States may only regulate in these areas if they are certified under the procedures of this section." *House Conference Report No. 96-1430,* 4 U.S. Code Cong. & Ad. News 4110 (96th Cong., 2d Sess. 1980), p. 106.

States were given a grace period of 120 days after the effective date of the Staggers Act to continue regulating intrastate rail transportation. 49 U.S.C. §11501(b)(2). If, during that period, a state filed its standards and procedures for regulating intrastate rail transportation with the ICC establishing that it would regulate according to standards and procedures for interstate transportation under the Interstate Commerce Act as amended by the Staggers Act, the grace period was further extended until decision on certification. 49 U.S.C. §11501(b)(3)(B). California did *not* file for certification, so that when the 120-day grace period expired January 29, 1981, California immediately lost jurisdiction over "intrastate rates, classifications, rules, and practices." 49 U.S.C. §11501(b)(4)(A); *Ex Parte No. 388, State Intrastate Rail Rate Authority, P.L. 96-448,* 364 ICC 881 (April 7, 1981), 46 Fed.Reg. 23335 (April 24, 1981), Appeal App. at 180a.

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[5] Section 214 has been codified in relevant part in 49 U.S.C. §10501 and 49 U.S.C. §11501.

C. The PUC's Constitutional Challenge To Section 214 Of The Staggers Act

On December 23, 1980, the PUC intervened in a constitutional challenge by the state of Texas attacking the preemption provisions of Section 214 of the Staggers Act. *Texas v. United States,* No. A 80 CA 487, (W.D. Texas, filed December 12, 1980). On January 7, 1981, SP intervened to oppose the PUC and other states challenging the Staggers Act. Cross motions for summary judgment were filed. On November 3, 1982, the Texas district court issued an order and judgment for the railroads and the ICC, upholding the constitutionality of Section 214; the PUC and state motions were denied. App. at 26a and 30a. The PUC did not appeal, although Texas and several other parties did. *Texas v. U.S.A.,* No. 82-1693 (5th Cir., argued September 27, 1983).

Meanwhile, the PUC, on January 6, 1981, had advised SP by letter that it was challenging Section 214 of the Staggers Act in Texas and refused to be bound by the Staggers Act. Appeal App. at 287a. Despite that challenge, on August 14, 1981, in its answer to SP's petition for review in S.F. No. 24316, the PUC told the California supreme court that if the court should issue a writ of review, as requested by SP, the court should also decide whether the PUC's jurisdiction over intrastate rail passenger service was preempted by the Staggers Act. App. at 75a-76a. SP replied, pointing out to the court that SP and the PUC were already litigating the issue of the constitutionality and scope of the Staggers Act in the Texas district court. App. at 91a.

On December 23, 1981, while the motions for summary judgment were still pending in the *Texas* case, the California supreme court, by minute orders, denied SP's petitions in S.F. No. 24220 and in S.F. No. 24316, App. at 24a and 24b, respectively.

D. The PUC's Affirmative Relinquishment of Jurisdiction Over Intrastate Transportation

Shortly thereafter, the PUC asked the ICC to undertake regulation of all California intrastate rail transportation, and the ICC did so on May 11, 1982. *Ex Parte No. 388, State Intrastate Rail Rate Authority—P.L. 96-448,* 365 ICC 700, 701, 47 Fed. Reg. 20220 (May 11, 1982), Appeal App. at 188a. Assumption of jurisdiction over California intrastate rail transportation by the ICC under 49 U.S.C. §11501(d)(4)(B) automatically terminates any residual police power of the state to order intrastate transportation services by carriers subject to the Interstate Commerce Act. 49 U.S.C. §10501(c).

California thus had no remaining police power to order intrastate transportation services from its railroads when the PUC issued its June 2 Order against SP requiring construction of stations, filing of tariffs and starting up of train service, the order which SP asked the federal district court to enjoin.

E. The Decisions Below

In response to the June 2 Order, SP filed suit on June 15, 1983, in the United States District Court for the Northern District of California seeking to enjoin the PUC from enforcing its order on the grounds that the Staggers Act had deprived California of jurisdiction to order the service. *Southern Pacific Transportation Company v. Public Utilities Commission,* No. C-82-3074 MHP. However, SP's action was dismissed by District Judge Marilyn H. Patel without reaching the fundamental question of the Staggers Act preemption. App. at 12a. Judge Patel concluded that the PUC's loss of jurisdiction over rail passenger service under Section 214 of the Staggers Act was, or could have been, raised and considered by the California supreme court and that the state court's denials of review on December 23, 1981, were appealable rulings to this Court on the issue of whether or not the Staggers Act applied to intrastate rail passenger service. App. at 14a. Motions for an emergency stay were denied by both the district court and the ninth circuit. App. at 21a and 23a, respectively.

SP appealed Judge Patel's decision to the United States Court of Appeals for the Ninth Circuit, which sustained the district court, again without reaching the merits of the preemption issue. *Southern Pacific Transportation Co. v. Public Utilities Commission*, No. 82-446 (filed August 19, 1982), App. at 1a. The Ninth Circuit rejected out of hand SP's contention that the Staggers Act preempts state regulation of intrastate railroad service:

> "... [W]e cannot accept that premise, in view of the state supreme court's decision to the contrary which Southern Pacific did not take to the Supreme Court of the United States." App. at 10a.

EXISTENCE OF JURISDICTION IN THE COURT OF FIRST INSTANCE

The action was brought in the United States District Court for the Northern District of California under 28 U.S.C. §1331 as a case arising under the Constitution and laws of the United States seeking injunctive relief from state regulation on the ground that such regulation is preempted by a new law enacted by Congress in the Staggers Rail Act of 1980. *Shaw v. Delta Airlines, Inc.*, 51 U.S.L.W. 4968 (U.S. June 24, 1983).

REASONS FOR GRANTING THE WRIT

I.

THE DECISIONS BELOW ARE AN ERRONEOUS APPLICATION OF RES JUDICATA, SURE TO INCREASE THE NUMBER OF PRECAUTIONARY INTERLOCUTORY PETITIONS AND APPEALS TO THIS COURT

The clear message of the opinions below is that a litigant must appeal to this Court whenever a federal question is arguably ripe for review — even where the ongoing state proceedings may dispose of the entire dispute on nonfederal grounds and where the parties already have presented the federal issue to a federal court.

A. California Had Lost Jurisdiction Of Intrastate Rail Passenger Service Before The June 2 Order Issued

The core issue here is the preemption of California's authority to order intrastate rail passenger service by the Staggers Act. The facts are undisputed; the Staggers Act was enacted by Congress, signed by the President, and is the law of

the land. If states desire to continue a role in regulating intrastate transportation, they must do so "exclusively in accordance with" the Interstate Commerce Act. 49 U.S.C. §11501(b)(1).

The first step which a state must take to continue regulation is to secure approval of state regulatory standards and procedures from the ICC. 49 U.S.C. §11501(b)(2) and 49 U.S.C. §11501(b)(3)(A). It is conceded that California never took that first step; it did not seek certification, whereupon it "may not exercise *any* jurisdiction over intrastate rates, classifications, rules and practices until it receives certification . . . " 49 U.S.C. §11501(b)(4)(A). (emphasis added). Then, California affirmatively requested the ICC to assume regulation of California intrastate rail traffic, and the ICC did so on May 11, 1982. *Ex Parte 388, State Intrastate Rail Authority—P.L. 96-448, supra,* 365 ICC at 701; 49 U.S.C. §11501(b)(4)(B). When the ICC accepted jurisdiction, California lost authority to order California railroads to provide transportation services. 49 U.S.C. §10501(c).

On these facts, it is impossible to avoid the conclusion that California had, prior to June 2, 1982, lost jurisdiction to order SP to provide intrastate rail passenger transportation.

B. The Constitutionality And Effect Of The Staggers Act Was Already Being Litigated In Federal Court

The Staggers Act issue was not submitted by SP to the California supreme court for ruling on the merits because the issue was already being litigated by the same parties in a federal court. SP advised the California court in its pleadings that a primary jurisdictional forum *had already been selected by California* for testing the constitutionality of the Staggers Act provisions.

> ". . . we should advise the Court that the scope and effect of the Staggers Act preemptions, for both freight and passenger service, has been assailed by a number of states, including California, in a constitutional test filed in the United States District Court for the Western District of Texas (*State of Texas, et al. v. United States of America, et*

> *al.*, Docket No. A-80-CA-487) . . . it is anticipated that the Texas litigation will serve as the primary constitutional challenge on this and related issues." Petitioners' Reply to Answers of Respondent and Real Party in Interest, S.F. No. 24316, filed September 3, 1981, App. at 91a.

Indeed if the doctrine of res judicata is to be applied at all in this case, it should be applied *against the PUC;* the PUC should be bound by the result of the proceeding in which both the PUC and SP argued the preemption of Section 214 of the Staggers Act at length: the *Texas* case.

This litigation was started by the State of Texas; on December 23, 1980, the PUC intervened; on January 7, 1981, SP intervened. On March 12, 1981, SP filed a joint motion with the ICC for summary judgment; on April 21, 1981, the PUC, jointly with the states of Texas, New York, Tennessee and Kansas, filed a cross-motion for summary judgment. On November 3, 1982, the court entered its order and judgment *denying* the PUC joint motion and *granting* the SP joint motion. It thus held that the Staggers Rail Act of 1980 does in fact preempt California's jurisdiction over California intrastate rail transportation. App. at ____. *The PUC did not appeal;* thus, that judgment is final as to the PUC.[6] The PUC should now be estopped, by the doctrine of res judicata, from challenging in this or any other court the proposition that the PUC has no jurisdiction to regulate California intrastate rail transportation.

Judge Patel considered the PUC's actions complete on June 3, 1980, with implementation delayed by procedural stays until June 2, 1982. App. at 13a. Yet those stays and extensions were ordered by the PUC for one reason, a reason which was obvious from the context in which they were entered: SP and the PUC had already joined issue in Texas in the constitutional challenge to Section 214 of the Staggers Act, and the PUC elected not to attempt to exercise authority which the Texas court could, at any moment, tell the PUC it did not have.

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[6] As stated in 46 AM. JUR. 2d *Judgments* § 461: "It is clear that, for purposes of res judicata, a judgment is final where the time to appeal has expired without an appeal being taken." *See also Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 399 (1981).

C. Review By This Court Of The Federal Issue In December 1981 Would Have Been Premature

Even putting aside the primary forum election of the PUC to litigate in Texas, the certainty that further orders would be issued by the PUC before actual start-up of the commuter train plus the substantial possibility that the dispute might be resolved in the course of discussion and negotiation between SP and Caltrans meant that the dispute could well be disposed of on nonfederal grounds or could become moot.

This Court's decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) established that where a federal issue has been finally decided in the state courts but the proceeding remains open below with a possibility of resolution on state grounds, immediate review of the federal issue is appropriate where "the refusal immediately to review the state-court decision might *seriously erode federal policy*". 420 U.S. at 483. (emphasis added). But this case was not a case in which a failure to seek immediate review might seriously erode federal policy.

First, a comprehensive judicial challenge to Section 214 of the Staggers Act, in which both SP and the PUC were full participants, and in which every major relevant interest, including the ICC and the National Association of Railroad and Utility Commissioners, were represented, had already been undertaken in the Texas district court. It would have been an unreasonable imposition on the time of this Court to request immediate review of a subissue involving a portion of that controversy, i.e., whether *passenger* service was included within the scope of Section 214, while the *Texas* case was pending.

Furthermore, prior to June 2, 1982, SP was not required to do anything more than negotiate with Caltrans. The PUC had stayed all other orders against SP "pending further review of this matter". Decision 93118 (May 22, 1981) (unreported), Appeal App. at 100a. Later, the PUC had modified essential findings to put Caltrans on notice that it should be prepared to pay SP a significantly higher rate of compensation than had

been ordered in earlier decisions. Decision 93211 (June 16, 1981) (unreported), Appeal App. at 102a. Specifically, the PUC told Caltrans that SP must be "compensated for all freight and Amtrak delay costs" caused by the commuter trains and must receive "a reasonable rental" for the commuter stations and parking lots. *Id.* at 113a. The PUC further informed Caltrans that the contract with SP must provide SP "a just and reasonable rate of return in light of federal and state statutory and constitutional law." *Id.* at 114a. The stay was to "remain in effect until further order of the [PUC]." *Id.* at 114a. It was not until June 2, 1982 that service was actually ordered, and it was at that point that federal policy—the Staggers Act—was seriously threatened.

In these circumstances it can hardly be argued that the April 1981 decisions appealed from in SP's petition to the California supreme court were final. The ultimate service order was premised upon Caltrans' willingness to pay. If Caltrans had been willing to adequately compensate SP for operating the commuter trains so that the proposed commuter service would be as compensatory to SP as a new freight service with comparable demands, the proceedings would have become moot. If, on the other hand, Caltrans had been unwilling to pay revenue adequate compensation, SP could reasonably expect that the request would be abandoned, and the proceedings terminated. Had Caltrans' purse suggested a modification of its initial proposal, further proceedings before the PUC would have been required.

Under all these circumstances, the PUC order to negotiate, though concededly a prohibited trespass upon the ICC's jurisdiction to regulate intrastate transportation,[7] was not such as to "seriously erode federal policy" and to justify immediate review under *Cox Broadcasting, supra.*

Indeed, based on this Court's prior decision in *Dump Truck Owners Assn. v. Public Util. Comm'n,* 434 U.S. 9 (1977) (per curiam), this Court would not have accepted SP's appeal in

[7] Because it directed negotiation of rates and practices. 49 U.S.C. §11501(b)(4)(A).

these circumstances. This Court has held that, while proceedings remain open before a state agency and those hearings "may remove the basis for, or significantly alter the nature of, appellants' constitutional attack," this Court will not hear a challenge to constitutional issues. *Ibid.* In *Dump Truck,* a group of dump truck owners attempted to challenge the constitutionality of tariffs promulgated by the PUC. After the appellants had filed their jurisdictional statement with this Court, the PUC reopened its proceedings. Because those proceedings might dispose of the dispute on other than constitutional grounds, this Court dismissed the appeal without prejudice. *Ibid.*

Precisely the same result should lie here. The PUC—the same PUC as in *Dump Truck* — had stayed its proceedings pending negotiations. Had SP appealed to this Court in December 1981, it would have been told that its appeal was premature.

If a party must appeal to this Court each time a federal issue is arguably ripe for review, even when the same issue is being litigated in a different forum or when the matter may be resolved on a nonfederal basis, parties will be forced to take precautionary appeals to this Court immediately. The result will be an increase of petitions on an already overburdened system.

II.

WHERE THE BASIS FOR THE CALIFORNIA SUPREME COURT'S DENIAL OF A PETITION FOR REVIEW IS UNCERTAIN, THE CALIFORNIA RULE FORBIDS THE APPLICATION OF RES JUDICATA

A. The Denials Of December 23, 1981, By The California Supreme Court Could Have Been On Procedural Grounds

The California supreme court's minute orders of December 23, 1981, denying review were entered without opinion. While this Court in 1920 accepted California's contention that the effect of such orders is a denial on the merits of all issues raised,

Napa Valley Co. v. R.R. Comm., 251 U.S. 366, 372-373 (1920), a much more recent California supreme court opinion explained that such a mechanical rule "ignores the realities of our rulings on such petitions." *Consumers Lobby, Etc. v. Public Util. Com'n*, 25 C.3d 891, 899, 603 P.2d 41, 45 (1979). In *Consumers Lobby*, the California supreme court revealed that petitions for writs of review may be denied on any number of grounds, procedural or substantive. There are two grounds which are specifically applicable here: (1) lack of finality in the PUC order, and (2) speculative harm.

As to the first ground, the California supreme court explained:

> " . . . the petitioner may bring his case before us too soon. Although the code appears to permit the filing of a petition for rehearing and hence a petition for review after 'any order or decision' of the [PUC],"

it may be denied if it appears that the order is

> "a step in a larger, ongoing proceeding not yet finally resolved by the [PUC] . . . [T]he question of when a [PUC] action is sufficiently final for purposes of judicial review is often perplexing to the court. It is clear, however, that each time we deny all or part of a petition for lack of ripeness, we do not adjudicate its substantive issues." 25 C.3d at 903-904, 603 P.2d at 48.

Second, the California supreme court stated:

> "[W]e will deny the petition without reaching substantive issues when it appears that for any reason the applicant was not in fact aggrieved by the action of the [PUC]. This result follows, for example, if the alleged harm is merely speculative . . . " *Id.* at 904, 603 P.2d at 48.

Either ground applies with equal force to the facts of this case. First, the PUC proceedings remained open long after the denials by the California supreme court of SP's petitions on December 23, 1981; hearings were held and further decisions were issued by the PUC with respect to the passenger train service. Second, while the proceedings were ongoing, the only

obligation imposed on SP was to negotiate with Caltrans over a facilities and service agreement. A directive to negotiate, without more, produces only speculative harm.

B. Where The Basis For The Decision Is Uncertain, Res Judicata Cannot Apply

The very fact, however, that SP's petitions could have been denied on either of these procedural grounds means that the denials cannot be the basis for the application of the res judicata doctrine. The California courts have held that:

> "[I]t is settled that a judgment should not be the basis for the application of the doctrine of res judicata if anything is left to conjecture as to what was necessarily involved and decided." *Irwin v. Irwin*, 69 C.A.3d 317, 322, 138 Cal.Rptr. 9, 11 (1977).

See also Title Guarantee & Trust Co. v. Monson, 11 C.2d 621, 632 (1938).

The second circuit has held that California law on res judicata must be applied as to a California judgment. *Ackerman v. Ackerman*, 676 F.2d 898, 903-904 (2d. Cir. 1982). In that case the second circuit refused to give res judicata effect to a California judgment because it held the case to be one in which "the California courts would give equitable relief from the doctrine of res judicata . . ." *Ackerman v. Ackerman, supra* at 904.[8]

Thus, since the minute orders of December 23, 1981 do not specify the basis for the denial of SP's petitions and could have been on at least two procedural grounds, the rule of California forbids application of res judicata to those decisions.

[8] The circumstances of this case compel a similar conclusion: this is a case in which an ongoing federal court proceeding was considering the constitutionality of the very statute which the ninth circuit says SP should have challenged more forcefully in the state supreme court. Moreover, SP had no reason to doubt that the dispute would be resolved on nonfederal issues in the state proceeding. Equity dictates that the December 31, 1981, minute orders should not be given res judicata effect as to any Staggers Act issue.

III.

RES JUDICATA CANNOT BE APPLIED TO STATE COURT JUDGMENTS WHICH FRUSTRATE AN EXERCISE OF CONSTITUTIONAL POWERS RESERVED TO CONGRESS

The ninth circuit summarily rejected SP's contention that res judicata cannot be applied here by relying upon the general proposition that the federal courts will give res judicata effect to state court decisions on federal constitutional issues, citing *Grubb v. Public Utilities Commission,* 281 U.S. 470 (1970).

However, this general proposition has important exceptions. In *Durfee v. Duke,* 375 U.S. 106 (1963), this Court cautioned:

> "To be sure, the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling. *Kalb v. Feuerstein,* 308 U.S. 433 [1940]; *United States v. United States Fidelity Co.,* 309 U.S. 506 [1940]." 375 U.S. at 114, *also citing at n. 12,* RESTATEMENT OF CONFLICT OF LAWS §451(2) (Supp. 1948).

Examples of refusals to accord res judicata effect include *Kalb v. Feuerstein, supra,* in which Congress had evidenced an explicit intention to withdraw the subject matter from state authority and place it in the bankruptcy courts; *United States v. United States Fidelity Co., supra,* involving claims of Indian sovereign immunity, *Consolidated Rail Corp. v. State of Ill.,* 423 F. Supp. 941 (Rail Reorg. 1976), *cert. denied,* 429 U.S. 1095 (1977) in which the special court established under the Regional Rail Reorganization Act refused to accord preclusive effect to a judgment from the United States District Court for the Eastern District of Illinois; and *Pennsylvania Railroad Company Co. v. Sharfsin,* 240 F. Supp. 233 (M.D. Pa.), vacated on other grounds sub. nom. *Utility Comm'n v. Pennsylvania R. Co.,* 382 U.S. 281 (1965) (per curiam), *aff'd,* 369 F.2d 276 (3rd Cir.), *cert. denied,* 386 U.S. 982 (1966), in which the district court refused to accord preclusive effect to prior state proceedings.

The doctrine of res judicata has as its justification society's need for finality in matters fairly adjudicated. However, when the application of that policy collides with a higher policy whose force flows directly from the Constitution itself, the former must give way. As the court stated in *Consolidated Rail Corp.* v. *State of Ill., supra:*

> "Although the policies of terminating litigation, avoiding inconsistent results, and repose, which support application of res judicata to questions of subject matter jurisdiction, may vindicate the general rule that litigated questions of subject matter jurisdiction cannot be collaterally attacked, the policy basis for the rule should make us wary of its procrustean application. Here, countervailing policy considerations support the conclusion that Congress...intended to void determinations made by other courts, when these determinations were reserved for our exclusive consideration. [Footnote omitted]. The legislative mandate overpowers the general rule." 423 F.Supp at 947-948.

The express language of the Staggers Act strips uncertified states of "jurisdiction" over the subject of "intrastate rates, classifications, rules and practices". 49 U.S.C. §11501 (b)(4)(A). After the ICC assumed jurisdiction over California intrastate transportation pursuant to 49 U.S.C. §11501(b)(4)(B), California lost its "police power, to require reasonable intrastate transportation." 49 U.S.C. §10501(c). Furthermore, Congress has declared that the "action of the [ICC] under this section supersedes state law or action taken under state law in conflict with the action of the [ICC]." 49 U.S.C. §11501(f).

The Congressional purpose of Section 214 of the Staggers Act is explicitly stated thus:

> "The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce

> Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available." *House Conference Report No. 96-1430, supra.*

Here, Congress' power to regulate interstate commerce flows directly from art. I, §8, cl. 3 of the United States Constitution, and Congress' power to control related intrastate transactions cannot be questioned. *Houston & Texas Ry. v. United States,* 234 U.S. 342, 351-352 (1914). Pursuant to that authority, Congress enacted the Staggers Act.

The language adopted by Congress in the Staggers Act and the Conference Report explaining its purpose evidences a clear intention of Congress to place beyond the reach of uncertified states any power to preserve state jurisdiction, directly or indirectly. Thus, the state court must give way to the force of the Congressional mandate; the state court judgment cannot be res judicata. See Dobbs, The Validation of Void Judgments: The Bootstrap Principle, 53 *Va. L. Rev.* 1003 (1967) at 1027:

> "If a court has jurisdiction to determine its own jurisdiction because the sovereign has granted this preliminary power *res judicata* does not necessarily apply. *Res judicata* is a judicial doctrine and the judiciary may refuse to apply it when public interest demands. Thus even though a court has jurisdiction to decide its own jurisdiction, its judgment may still be denied any effect for reasons of public policy."

In this case, the Staggers Act represents Congress' action in the area of interstate commerce, and the policies and specific preemption of intrastate transportation embodied in the Staggers Act must take precedence over the doctrine of res judicata.

IV.

WHERE SP DID NOT RAISE THE STAGGERS ACT ISSUE TO THE STATE SUPREME COURT, SP CANNOT BE BARRED FROM LITIGATING THE ISSUE IN A NEW, RELATED CAUSE OF ACTION

A. The Staggers Act Issue Was Not Raised For Res Judicata Purposes Because SP Did Not Freely And Voluntarily Submit It To The California Supreme Court

The ninth circuit's decision affirming the res judicata effect of the California supreme court's December 23, 1981 denial of SP's petitions for review rests upon the assumption that that court had before it the question as to whether the Staggers Act preempts state regulation of intrastate railroad passenger service, and that the court concluded that the Staggers Act did not preempt. App. at 6a. Similarly, Judge Patel had held that SP's September 3, 1981 pleading in S.F. No. 24316 raised and argued the Staggers Act preemption and had concluded that SP had had its day in court. App. at 14a.

Both decisions completely mischaracterize the pleadings before the California supreme court. The SP discussion of the Staggers Act referenced by Judge Patel commenced with an explicit reservation:

> "Preliminarily, we should advise the court that the scope and effect of the Staggers Act preemptions for both freight and passenger service has been assailed by a number of states, including California, in a constitutional test filed in United States District Court for the Western District of Texas (*State of Texas et al. v. United States of America, et al.*, Docket No. A-80-CA 487) . . . it is anticipated that the Texas litigation will serve as the primary constitutional challenge on this and related issues. Meanwhile, we believe that the Act is clear and explicit and holds that California, as a non-certified state under the Staggers Act, may not enter intrastate service orders, and that if it attempts to enforce an intrastate service order, such an attempt can be enjoined in federal court.

"Should this Court desire to address this important issue, it would seem appropriate that further briefing would be called for from the parties so that this Court could have the full benefit of all the arguments on this very important matter and not just the rough-and-ready treatment which is all that is possible here.

"*Although SP does not believe the issue is properly before this Court at this time,* it might be helpful if we provided a brief background explanation of the Staggers Act preemption and explain why the California argument that passenger matters have not been preempted is fallacious and unfounded." (Petitioner's Reply to Answers of PUC and Caltrans, September 3, 1981, App. at 91a. (emphasis added).

Thus, SP told the California supreme court that a federal forum had already been invoked by the PUC for adjudication of the federal issue (the *Texas* litigation). Moreover, SP made it plain that SP did not intend, in any event, to have its Staggers Act claim decided by the state court. SP did, however, apprise the court of the federal issues so it might construe SP's non-federal claims with knowledge of the existence of federal claims.

In *England v. Medical Examiners,* 375 U.S. 411 (1964) this Court held that *only*

"if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forego his right to return to the District Court." 375 U.S. at 419.

But, this Court held, a free and voluntary submission by a party of a federal claim is not to be implied unless "it clearly appears that he voluntarily did more than [*Government Employees v.*] *Windsor* [353 U.S. 364 (1957)] required *and fully litigated his federal claims in the state courts.*" *Id.* at 421. (emphasis added). (In *Government Employees v. Windsor, supra* at 366, the Court indicated that a party should at least advise the state court of any constitutional issues, just as SP did here.)

The fact that a litigant furnishes the state court with a complete explanation of the federal issue does not prejudice his right to return to the federal court, this Court said in *England,* for "in the typical case .... [t]he litigant ... may be led not merely to state his federal constitutional claim but to argue it." *England v. Medical Examiners, supra* at 420. This may invite the state to rule in his favor, but it does not imply a surrender to the state authority on the issue.

While *England v. Medical Examiners* arose in the context of an abstention, its holding is equally applicable here. SP's petitions to the California supreme court raised a number of issues totally unrelated to the Staggers Act, as described on pp. 3-5, *supra.* Additionally, it advised the court of the federal constitutional issue as well as the fact that it was being litigated in Texas. However, the PUC cannot now deprive SP of its victory on the merits in *Texas* by a tenuous construction of the significance of the California supreme court's denial of petitions directed to state issues that SP was required under state law to raise.[9] As this Court stated in *England v. Medical Examiners, supra* at 415:

> "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims."

This Court also rejected the notion that the right to appeal the state court denials provides a sufficient opportunity to have the federal claim considered:

> "The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts." *Id.* at 417.

As this Court held in *England,* so should it hold here.

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[9] Under California law, the only means of challenging a PUC order is by the timely filing of an application for rehearing setting forth the grounds on which the order is believed to be unlawful. Cal.P.U.Code §1732. Those issues must then be raised in a petition for review to the California supreme court within 30 days after rehearing is denied, or, if it is granted, within 30 days after the decision on rehearing. Cal.P.U.Code §1756.

B. SP's June 1982 Federal Court Lawsuit Was Based On A New Cause of Action

The first event affecting California's jurisdiction over intrastate rail service took place on January 29, 1981, when, 120 days after the effective date of the Staggers Act, California failed to file for certification to regulate intrastate rail transportation. At that point, California could not exercise "any jurisdiction over intrastate rates, classifications, rules and practices" until it received certification. 49 U.S.C. §11501(b)(4)(A). As of January 29, 1981, California's authority over "rates, classifications, rules, and practices" had been preempted.

But California's loss of jurisdiction *did not mean* that the ICC contemporaneously acquired jurisdiction. The event which vests jurisdiction in the ICC is the denial of the state application for certification. 49 U.S.C. §11501(b)(4)(B). Since California and certain other states did not apply, the ICC devised a procedure whereby these states could affirmatively request the ICC to assume jurisdiction. *Ex Parte 388, State Intrastate Rail Rate Authority—P.L. 96-448,* Decision served February 8, 1982, 47 F.R. 5786, App. at 97a. California and five other states asked the ICC to assume intrastate regulation, and, accordingly, the ICC took jurisdiction May 11, 1982, five months *after* the December 23, 1981, minute order was issued. *Ex Parte 388, State Intrastate Rail Rate Authority—P.L. 96-448, supra* at 700, Appeal App. at 188a.

When the ICC took jurisdiction, two things happened: First, all California intrastate rail transportation became directly subject to the express provisions of the Interstate Commerce Act, to be regulated as if the California transportation were in interstate commerce. 49 U.S.C. §11501(b)(4)(B). Second, to ensure that the ICC's authority would be complete, unfettered, and unhindered by any inconsistent state conduct, states were stripped of any remaining police power authority "to require reasonable intrastate transportation," i.e., the right to order new train service. 49 U.S.C. §10501(c). And when the ICC acted to take jurisdiction, its action "supersedes state law or action taken under state law in conflict with the action of the Commission." 49 U.S.C. §11501(e).

Neither the district court nor the ninth circuit gave any consideration to SP's argument that, even if res judicata should apply as to issues of loss of state jurisdiction over rates and practices, the district court was not precluded from examining the consequences of the *assumption* of jurisdiction by the ICC. The June 2 Order which the action in the district court sought to block was an attempted exercise of jurisdiction over intrastate passenger transportation by California which was then expressly the ICC's, *not* because of anything that had transpired prior to the California supreme court's December 23, 1981, decision, but rather because of the May 11, 1982 order of the ICC assuming exclusive jurisdiction.

C. Both Federal And State Law Prohibit Application Of Res Judicata To Issues That Could Have Been Raised In A Prior Lawsuit Where The Current Suit Is Based On A New Cause Of Action

The assertion by the ICC of jurisdiction over California intrastate rail transportation, coupled with the direct application of the Interstate Commerce Act to California intrastate matters and an explicit loss of state power to order transportation, gave rise to a new cause of action on May 11, 1982. Res judicata cannot bar a new suit based on the new cause between the same parties.

This Court has repeatedly held that preclusive effect is given *only* to "the point or question actually litigated and determined in the original action, *not what might have been thus litigated and determined.*" *Cromwell v. County of Sac.*, 94 U.S. 351, 353 (1876). (emphasis added). *See also Mercoid Corp. v. Mid-Continent Co.*, 320 U.S. 661, 671 (1944) ("The case is . . . governed by the principle that where the second cause of action between the parties is upon a different claim the prior judgment is *res judicata* not as to issues which might have been tendered but 'only as to those matters in issue on points controverted, upon the determination of which the finding or verdict was rendered.' ").

This Court reaffirmed that principle in *Commissioner v. Sunnen*, 333 U.S. 591, 597-598 (1948), where it held again that

> "where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined"

but only as to controverted issues actually determined. To put it another way:

> "Before a party can invoke the collateral estoppel doctrine [in the second suit], the legal matter raised in the second proceeding must involve *the same set of events or documents* and the same bundle of legal principles that contributed to the rendering of the first judgment." *Id.* at 601-602. (emphasis added).

The California rule is the same. Indeed, California has adopted the *Sunnen* rule. *Younger v. Jensen*, 26 C.3d 412-413, 605 P.2d 813, 823 (1980). *See also Eichler Homes, Inc.* v. *Anderson*, 9 Cal.App 3d 244, 233, 87 Cal.Rptr. 893, 898 (1970) ("It is basic to the application of res judicata or collateral estoppel that the issue of the earlier action be *identical* to that in which the application is sought [citations omitted]. The principle operates only as to an issue which was actually litigated and determined in the first action.") (emphasis in original); *Title Guarantee & Trust Co. v. Monson, supra* at 631 (Res judicata is not "applicable to rights, claims or demands, although growing out of the same subject matter, but which constitute separate or distinct causes of action, and which were not put in issue in the former action.").

In this case, the May 11, 1982, assumption of jurisdiction created a new cause of action. SP's June 15, 1982, federal court lawsuit could not be barred, therefore, on the grounds that the Staggers Act issue might have been raised in its 1981 petitions. Thus, this Court should reverse the court of appeals' erroneous application of the res judicata doctrine.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC TRANSPORTATION CO.,
Plaintiff-Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Defendant-Appellee,

STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION,
Intervenor-Defendant-Appellee.

No. 82-4466

(D.C. No. C-82-3074-MHP)
OPINION

Appeal from the United States District Court for the Northern District of California
Honorable Marilyn Hall Patel, District Judge, Presiding
Argued and Submitted—April 11, 1983

Before: DUNIWAY, SNEED AND FARRIS, Circuit Judges

DUNIWAY, Circuit Judge:

Southern Pacific Transportation Co. appeals from the district court's judgment dismissing Southern Pacific's action seeking an injunction against enforcement of an order by the California Public Utilities Commission requiring Southern Pacific to run certain commuter trains within the state. The district court held that res judicata prevents consideration of Southern Pacific's argument that the Commission order is illegal because the order is preempted by federal law.

I. Facts.

This dispute arises from orders of the California Commission requiring Southern Pacific to run weekday commuter trains over its line between Oxnard and Los Angeles.

The Commission issued its first order on June 3, 1980. It required Southern Pacific to build several station platforms and parking lots and to run two trains each way every weekday. Equipment was to be provided by the county of Los Angeles and the state Department of Transportation (Caltrans), which had requested the commuter service. That order was stayed, however, and on September 23, 1980, the Commission issued another decision modifying the first order. The railroad petitioned for rehearing of the September order, and then on October 3, 1980 filed in the supreme court of California a petition for writ of review. That petition was docketed as No. S.F. 24220. It sought review of so much of the June order as was reaffirmed in the September order.

Early in 1981, the county of Los Angeles moved to withdraw as a complainant. On April 7, 1981, the Commission granted the county's motion. In two orders issued on that day, it also denied a motion by Southern Pacific to dismiss, and ordered the commuter service to begin. In response, Southern Pacific filed, on May 7, 1981, petitions for rehearing of the two April orders. The Commission stayed the portions of the orders demanding immediate construction of stations and parking lots, but on June 16, 1981, denied rehearing. Southern Pacific then, on July 16, 1981, filed in the state supreme court a second petition for a writ of review, this one referring to the Commission's April 7 and June 16 orders. The petition was docketed as S.F. No. 24316. On December 23, 1981, the state supreme court denied the two petitions for review without hearing or opinion. Southern Pacific did not seek review of the state supreme court's decision in the United States Supreme Court.

The Commission lifted the stay of its last order on June 2, 1982 and directed that the railroad begin construction of the station platforms and parking lots. In response, Southern Pacific filed in federal district court its complaint seeking

declaratory and injunctive relief against enforcement of the Commission's order. Its complaint named the Commission as the only defendant, but the district court later granted Caltrans' motion to intervene as a defendant.

Southern Pacific argued, inter alia, that the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895, section 214(a) of which amended 49 U.S.C. §11501, preempted the Commission's jurisdiction over commuter service. The Staggers Act was enacted on October 14, 1980, during the early stages of the proceedings before the state Commission. It required that a state "authority" seeking to exercise "jurisdiction over intrastate rates, classifications, rules and practices" must apply, within 120 days, for certification to the Interstate Commerce Commission (ICC). 49 U.S.C. § 11501(b)(2). If, after applying certain standards, the ICC refused to certify a state authority, of if the authority did not apply for certification, the authority was forbidden to "exercise any jurisdiction over intrastate rates, classifications, rules and practices ...." *Id.*, 11501(b)(4)(A).

California did not seek certification within the deadline under § 11501, and, on April 17, 1981, the ICC issued a decision stating, "States ... that did not seek certification have loss all jurisdiction to regulate intrastate rail transportation." *Ex Parte* No. 388, 364 I.C.C. 881, 46 Fed. Reg. 23335, 23337 (April 24, 1981). In another order, issued May 4, 1982, the ICC explained that California had since asked it to assume jurisdiction. It stated, "Consequently, the [Interstate Commerce] Commission shall assume jurisdiction over intrastate rail transportation in [California] upon publication of this notice in the Federal Register." *Ex Parte* No. 388, 365 I.C.C. 700, 47 Fed. Reg. 20220 (May 11, 1982).

Southern Pacific argued before the district court that because the Staggers Act preempted all state jurisdiction over all intrastate rail service in California, the Commission's orders were invalid. The Commission argued in response that the Staggers Act preempted state authority only over intrastate freight service, not passenger service. The district court did not reach the merits. It held instead that the California supreme court's denial of the petitions for review was res judicata as to

the preemption issue. Summary judgment was entered against Southern Pacific.

II. Our Jurisdiction.

We first consider whether Southern Pacific's action to enjoin enforcement of the Commission's order is a case "arising under" the federal Constitution or laws and thus is within the jurisdiction of the federal courts. 28 U.S.C. § 1331. This issue was not raised in the district court, and the parties argued it here only upon our instructions.

Southern Pacific's action to enjoin enforcement of the California Commission's order is based on its claim that federal law preempts the Commission's jurisdiction over passenger rail service. Thus, Southern Pacific sought to use preemption, which might have been its defense to a state court action to enforce the Commission's order, offensively in federal court to enjoin enforcement. Our order to the parties asked them to brief the issue of whether there is federal jurisdiction of such an action, citing *Miller-Wohl Co.* v. *Commissioner of Labor & Industry,* 9 Cir., 1982, 685 F.2d 1088.

Miller-Wohl was an action in federal district court by an employer seeking a declaratory judgment that federal law preempted a state law that the employer was accused of violating. We held that there was no federal jurisdiction of the employer's action because its claim was essentially a defense to the state court action. 685 F.2d at 1090-1091. *Accord Armstrong* v. *Armstrong,* 9 Cir., 1983, 696 F.2d 1237.

The plaintiffs in *Miller-Wohl* and *Armstrong* sought only declaratory judgments that federal law preempted the relevant state law. A decision by the Supreme Court since the date of oral argument in this case makes clear, however, that when a plaintiff seeks to *enjoin* state action because federal law preempts it, jurisdiction is proper. *Shaw* v. *Delta Air Lines, Inc.,* 1983, ____ U.S. ____, fn. 14 at ____ (June 24, 1983, slip op. at 9-10, n.14); *Franchise Tax Board* v. *Construction Laborers Vacation Trust,* 1983, ____ U.S. ____, ____-____, n.20 (June 24, 1983, slip op. at 18-19 & n.20).

In *Shaw,* plaintiffs filed actions for injunctive and declaratory relief in district court, alleging that the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, preempted certain state civil rights and disability payments statutes. In footnote 14, *id.* (slip op. at 9-10) the Court held that federal jurisdiction existed:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See *Ex parte Young,* 209 U.S. 123, 160-162 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. (citations omitted.)

See, to the same effect, *Construction Laborers Vacation Trust, supra,* ____ U.S. at ____ n.20 (slip op. at 18 n.20).

Because Southern Pacific's complaint sought to enjoin enforcement of an order it claimed to be preempted by federal law, the case "arose under" federal law. 28 U.S.C. § 1331. *See Conference of Federal Savings & Loan Ass'ns* v. *Stein,* 9 Cir., 1979, 604 F.2d 1256, 1259, *aff'd mem.,* 1980, 445 U.S. 921 (cross claim for injunction); *Rath Packing Co.* v. *Becker,* 9 Cir., 1975, 530 F.2d 1295, 1303-1306, *aff'd sub nom. Jones* v. *Rath Packing Co.,* 1977, 430 U.S. 519. *United Air Lines, Inc.* v. *Division of Industrial Safety of the Department of Industrial Relations,* 9 Cir., 1980, 633 F.2d 814, appears to be the contrary, but its holding on this issue, *id.* at 816-817, is disapproved by the rule recited in *Shaw.* See Justice White's dissent to the denial of certiorari, 1981, 454 U.S. 944, 946-950.

III. Res Judicata.

The California supreme court denied writs of review of decisions of the California Commission. That is a denial on the merits and is to be given res judicata effect in federal courts. *The Pacific Telephone & Telegraph Co.* v. *Public Utilities Commission,* 9 Cir., 1979, 600 F.2d 1309, 1311-1312; *see* 28

U.S.C. § 1738. "Under res judicata, a final judgment on the merits of an action precludes the parties . . . from relitigating issues that were or could have been raised in that action." *Allen* v. *McCurry,* 1980, 449 U.S. 90, 94.

Southern Pacific does not dispute these general propositions, but argues that they do not apply here. Its principal argument, which it repeats in various forms, is that because the Staggers Act preempts state regulatory jurisdiction over intrastate railway service, it forbids any state court from ruling to the contrary. Southern Pacific misses the mark in two directions. First, it presumes its own interpretation of the Act—that the Act does indeed preempt state regulatory jurisdiction over all intrastate rail service. That, of course, is contrary to the state court decision to which we are considering giving res judicata effect. If res judicata applies, a fortiori, it defeats Southern Pacific's premise. Second, the railroad confuses a state's regulatory authority under the Act with a state court's authority to interpret the Act.

The Supreme Court in *Grubb* v. *Public Utilities Commission of Ohio,* 1930, 281 U.S. 470, made it clear that, where res judicata applies, a federal court must respect a state court's interpretation of federal law. In that case, a bus operator sued in federal court to enjoin a state utilities commission order. The federal court dismissed the action, holding it barred by the res judicata accorded a state supreme court decision issued while the federal suit was pending. The issue in both suits was whether the state commission's order violated the Commerce Clause. The bus operator argued that res judicata did not apply because the state court lacked subject matter jurisdiction. The Court stated:

> The [bus operator] relies on the commerce clause of the Constitution as in some way operating to commit to the federal courts and to withhold from the state courts jurisdiction of all suits relating to the regulation or attempted regulation of interstate commerce. This view of that clause is quite inadmissible. It has no support in any quarter, is at variance with the actual practice in this class of litigation, . . . and is in conflict with the doctrine often sustained by this Court that the state and federal courts

> have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts.

281 U.S. at 475-476 (citations omitted).

We applied the principle of *Grubb* in *Board of Trustees of Carpenters Pension Trust Fund for Northern California* v. *Reyes*, 9 Cir., 1982, 688 F.2d 671, to give res judicata effect to a California state court ruling on a preemption issue, and see no reason why we should not do the same here.

Nevertheless, Southern Pacific contends that *Grubb* does not require res judicata treatment of a California court's interpretation of the Staggers Act because the Interstate Commerce Commission has exclusive "subject matter" jurisdiction under the Act. It relies on the decision of a three-judge district court in *Pennsylvania Railroad Co.* v. *Sharfsin*, M.D. Pa., 240 F. Supp. 233, *vacated sub nom. Pennsylvania Public Utilities Commission* v. *Pennsylvania Railroad Co.*, 1965, 382 U.S. 281. The Supreme Court vacated the decision because a three-judge court was not required. Thus the decision of the three-judge court is a nullity.

Southern Pacific points to nothing in the Staggers Act giving federal *courts* exclusive subject matter jurisdiction over cases arising under the Act. For that reason, *Kalb* v. *Feuerstein*, 1940, 308 U.S. 433, and *Consolidated Rail Corporation* v. *Illinois*, Regional Rail Reorg. Ct., 1976, 423 F. Supp. 941, do not control. Absent such a grant of exclusive judicial subject matter jurisdiction, the Act is subject to state court interpretation. The case of *Chicago* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 1958, 357 U.S. 77, is not in point for several reasons, the most readily apparent being that no state court there had interpreted the state's regulatory jurisdiction under a federal statute.

Southern Pacific further argues that a state administrative agency's decision should not be given preclusive effect when the agency lacks jurisdiction over the subject matter of the decision. However, it is not the *State Commission's* decision to which the

district court gave res judicata effect, it was the decision of the *California supreme court.* For that reason, *Lightsey* v. *Harding, Dahm & Co.,* 7 Cir., 1980, 623 F. 2d 1219, is not persuasive.

The railroad argues that res judicata cannot permit a state to violate the Supremacy Clause, any more than a common law doctrine or state statute can. Federal courts, however, are required by federal law to apply res judicata to state court decisions. 28 U.S.C. § 1738; *see Allen, supra,* 499 U.S. at 96. Moreover, the cases upon which Southern Pacific relies, *Chicago & N. W. Transportation Co. v. Kalo Brick & Tile Co.,* 1981, 450 U.S. 311, and *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 1907, 204 U.S. 426, are not in point because they concern state court claims for relief that were appealed to the Supreme Court and held by it to be preempted. These cases might have helped Southern Pacific in a direct appeal or petition to the Supreme Court of the decisions of the California supreme court. They go to the merits of the railroad's preemption claim, a subject we do not reach here.

Southern Pacific argues in its reply brief for the first time on appeal that the state supreme court's denial of its petitions for review of the Commission's orders should not be given res judicata effect because the denial was not on the merits, but "purely procedural." It contends that state law required the California court to deny the petitions because (1) the Commission proceedings appealed from were not final, and (2) the Staggers Act preemption issue was not raised, and could not have been raised, before the Commission; therefore, the state court was not permitted to rule on it.

We need not consider the first argument because it was not raised below. *See Hamilton* v. *Firestone Tire & Rubber Co.,* 9 Cir., 1982, 679 F.2d 143, 146.

The second argument is that because Art. III, § 3.5 of the California constitution prohibits the Commission from entertaining the preemption issue, under Cal. Pub. Util. Code § 1732, the state supreme court could not have entertained the issue either.

Art. III, § 3.5 states that an administrative agency has no power:

> (a) To declare a statute unenforceable, or to refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Cal. Pub. Util. Code § 1732 limits judicial review of Commission proceedings by providing:

> The application [to the Commission] for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application.

Thus, Southern Pacific contends that § 3.5 prohibited the Commission from considering the preemption question, that therefore the issue could not have been raised in an application for rehearing under § 1732, and that therefore the California supreme court could not have considered it on review.

Section 3.5 did not prohibit Southern Pacific from stating its preemption claim to the Commission, however. It forbids the Commission from declaring any state statute unconstitutional or unenforceable, but it does not prohibit a party before the Commission from stating an issue in order to preserve it for review by the California supreme court. Moreover, Southern Pacific has pointed to no statute that the Commission would be striking down by recognizing any purported preemption of state authority by the Staggers Act.

Southern Pacific argues further that it could not have raised the Staggers Act issue before the Commission because,

under the Act, the state was not divested of railroad authority until after the Commission's orders were issued. But Southern Pacific could have raised, and apparently did raise, the preemption issue in its motion for rehearing of the Commission's orders of April 7, 1981. The ICC stated on April 17, 1981, that California was without jurisdiction under the Staggers Act. *Ex Parte* No. 388, 364 I.C.C. 881, 46 Fed. Reg. 23335. Southern Pacific's petition for rehearing of the Commission's orders was not filed until May 7, 1981, and the railroad admits that that petition "referr[ed] in the process to the Staggers Act." Opening brief at 12.

Finally, Southern Pacific suggests that even if res judicata would otherwise be proper, this court should decline to apply it here for reasons of equity. But the only equitable concern the railroad puts forth is its contention, made repeatedly above, that the Staggers Act preempts state regulation of intra-state railroad service. As we have already explained, we cannot accept that premise, in view of the state supreme court's decision to the contrary which Southern Pacific did not take to the Supreme Court of the United States.

Affirmed.

IV.

We feel compelled to note what appears to us to be a dereliction of duty to the court on the part of Southern Pacific's counsel. On its face, this court's decision in *United Airlines, Inc.* v. *Division of Industrial Safety, supra,* is contrary to Southern Pacific's contention that the district court had "arising under" jurisdiction, 28 U.S.C. § 1331. However, counsel did not mention it in their briefs. This, we suggest, is a breach of the duty imposed by counsel in the Code of Professional Responsibility DR 7-106(B)(1):

> In presenting a matter to a tribunal, a lawyer shall disclose . . . legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

We note that the law firm that represents Southern Pacific here also represented United Airlines in that case.

We are equally puzzled that counsel for the California Commission and Caltrans did not cite *United Airlines,* but we

know of no rule of professional responsibility that requires a lawyer to cite to the court every case that supports the lawyer's position. We shudder to think what problems such a rule would create, in light of the enormous increase in reported decisions of this and other courts in recent years.

Southern Pacific Transportation Co. v. Public Utilities Commission Of the State of California, et al.—No. 82-4466

SNEED, Circuit Judge, Concurring:

In a very real sense this case reveals a series of missed opportunities on the part of appellant to have its preemption claims heard and decided. As it turns out, the appellant could have brought its suit to obtain an injunction in federal court following the enactment of the Staggers Act and prior to the California Supreme Court's denial of appellant's petition for review. Perhaps, but by no means certainly, it could have brought suit in federal court seeking only a declaratory judgment at that time also. At the time any decision to initiate such suit would have had to have been made, however, *United Air Lines, Inc.* v. *Division of Industrial Safety of the Department of Industrial Relations,* 633 F.2d 814 (9th Cir. 1980), presented a formidable obstacle to such a course of action. Justice White's dissent to the Supreme Court's failure to grant *United's* petition for certiorari made plain that the Court clearly understood the scope of this court's holding. The footnotes in *Franchise Tax Board* v. *Construction Laborers Vacation Trust,* U.S. (1983), and *Shaw* v. *Delat Air Lines, Incl,* U.S. (1983), now make clear that Justice White's views have prevailed and that *United Air Lines* no longer properly represents the law. The appellant, of course, must suffer for failing to urge at an earlier point in time that *United Air Lines* be overturned.

The missed opportunity that proves fatal, however, is the faliure to present vigorously the preemption argument before the California Supreme Court and the failure to seek review by the Supreme Court of the United States. Having chosen to exchew recourse to the federal courts prior to termination of the state proceedings, although perhaps on the basis of a misapprehension of the law, the appellant must be subjected to the consequences of res judicata.

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WILLIAM L. WHITTAKER
U.S. DIST. COURT
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Defendant.

No. C-82-3074 MHP

ORDER

Southern Pacific Transportation Company (hereinafter "Southern Pacific") has filed an action seeking an injunction against the Public Utilities Commission of the State of California (hereinafter the "PUC") to prevent it from enforcing PUC Decision No. 82-06-045, issued on June 2, 1982. Southern Pacific has moved for a preliminary injunction, and the PUC has moved to dismiss the complaint (the court understands this to be a motion to dismiss the action with prejudice) on res judicata grounds. The State of California has applied to intervene as a defendant. The court, having considered the memoranda and other papers submitted by the parties, and having heard oral argument on the motions, dismisses the action. It is therefore unnecessary to act on the application for intervention.

The uncontroverted allegations of the complaint are as follows. This controversy began on May 18, 1978, when complaints were filed with the PUC, requesting that it order

Southern Pacific to institute commuter rail service between Oxnard and Los Angeles. Public hearings on the question commenced on July 30, 1979. On June 3, 1980, the PUC issued its first order requiring that Southern Pacific provide the service. Pursuant to a petition by Southern Pacific, the PUC agreed to a rehearing, but only on the issue whether it was operationally feasible to combine commuter service with existing service on that line. On October 30, 1980, Southern Pacific filed with the California Supreme Court a petition for a writ of review of the PUC's decision as to issues that were not to be reheard, pursuant to Cal. Pub. Util. Code § 1756. (On July 16, 1981, Southern Pacific supplemented that petition to include issues that, by then, had been reheard.) The rehearing resulted in two PUC decisions, issued April 7, 1981, essentially reaffirming its earlier decision to require Southern Pacific to institute the service.

Further petitions for rehearing were denied, although Southern Pacific received stays and extensions of time thereafter from the PUC. On December 23, 1981, the California Supreme Court denied without comment Southern Pacific's petition for review. After more extensions of time, the PUC on June 2, 1982 issued Decision No. 82-06-045, requiring that construction of improvements needed to institute the service begin on or before June 15, 1982, and that they be completed on or before October 15, 1982. Southern Pacific then filed this action, alleging that federal law preempts state law and precludes PUC regulation of intrastate commuter service, and that the action of the PUC places an undue burden on interstate commerce.

Southern Pacific contends that because California failed to seek certification by the Interstate Commerce Commission (hereinafter the "ICC") of its standards and procedures for regulation of intrastate rail passenger transportation by January 29, 1981, the PUC lost jurisdiction as a result of preemption by section 214 of the Staggers Rail Act, 49 U.S.C. § 11501. It points to the ICC's decision of April 22, 1981 in Ex Parte 388, at p. 7, in which the ICC said that ten states, including California, and the District of Columbia, "have lost all jurisdiction to regulate intrastate rail transportation."

This court does not reach the question whether or when the PUC lost jurisdiction. But it is clear from the undisputed allegations of the complaint that the question of preemption and loss of jurisdiction was available as an issue to be raised by Southern Pacific long before the briefing was completed in the petition to the California Supreme Court. And, in fact, Southern Pacific did argue the question before that court. *See* Petitioner's Reply to Answers of Respondent and Real Party in Interest, dated Sept. 3, 1981, at pp. 14-20. It also raised the interstate commerce issue in its petition. Supplement to Petition for Writ of Review, dated May 7, 1981. Review by the United States Supreme Court of the state Supreme Court's adverse decision was available to Southern Pacific. 28 U.S.C. §1257.[1]

When there has been a final judgment on the merits in a prior state-court action, a federal-law claim between the same parties, seeking similar relief in federal court, is barred by the doctrine of res judicata, if it arises from the same wrong as that on which the judgment was based, and if it could have been raised in the state court action, whether or not it was actually was raised. *Gallagher* v. *Frye,* 631 F.2d 127 (9th Cir. 1980);

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[1] The PUC suggests that Southern Pacific, having been unsuccessful before the PUC, could have chosen to present its claims in federal district court, foregoing review by the California Supreme Court. Whether this is so is unclear. There is authority supporting abstention by the district courts in these circumstances. *See Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951); *Allegheny Airlines, Inc. v. Pa. Pub. Util. Comm'n,* 465 F.2d 237 (3d Cir. 1972), *cert. denied,* 410 U.S. 943 (1973); *Cal. v. Oroville-Wyandotte Irrigation Dist.*, 409 F.2d 532 (9th Cir. 1969); *Atlantic Coast Line R.R. v. City of St. Petersburg,* 242 F.2d 613 (5th Cir. 1957). Underlying such abstention by district courts is the doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315, *reh'g denied,* 320 U.S. 214 (1943). But it is unclear whether a district court could properly abstain on *Burford* grounds in the circumstances of this case. *See Turf Paradise, Inc. v. Arizona Downs,* 670 F.2d 813, 820 (9th Cir. 1982).

However, it is unnecessary to decide whether abstention would have prevented Southern Pacific from coming straightaway to federal district court. If so, there is all the more reason why this court should not now reach the merits of the controversy. If not, then Southern Pacific, having chosen its forum, should not now be permitted to utilize this one for the purpose of disturbing the state Supreme Court's judgment on the merits.

It appears from section 214 of the Staggers Rail Act of 1980, 49 U.S.C. § 11501, that Southern Pacific might have brought its preemption claim, and possibly also its interstate commerce claim, before the Interstate Commerce Commission. *See id.*, § 11501(c). Again, this is an issue the court need not and does not reach.

Scoggin v. *Schrunk*, 522 F.2d 436 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976). *See also Grubb* v. *Public Utilities Commission of Ohio*, 281 U.S. 470 (1930) (all matters that were or could have been raised were concluded, so long as the state supreme court had jurisdiction of the subject matter). A denial by the state Supreme Court, even without written opinion, of a petition for a writ of review of a PUC order constitutes a final adjudication on the merits for res judicata purposes. *Pacific Telephone & Telegraph Co.* v. *Public Utilities Commission of the State of California*, 600 F.2d 1309 (9th Cir.), *cert. denied*, 444 U.S. 920 (1979). Southern Pacific, having had its day in court, is barred here.[2] *See Alabama Public Service Commission* v. *Southern Railway*, 341 U.S. 341, 349

[2] In oral argument before this court, Southern Pacific suggested that the combined effect of article III, § 3.5 of the California Constitution and Cal. Pub. Util. Code § 1732 is to withdraw jurisdiction from the California Supreme Court to entertain Southern Pacific's federal-law claims based on preemption and lack of PUC jurisdiction, and on the commerce clause. Article III, § 3.5 provides that administrative agencies have no power to declare a statute unconstitutional or to refuse to enforce it on the ground that it is unconstitutional, absent a determination of its unconstitutionality by an appellate court. It also provides that absent an appellate court determination, an agency may not refuse to enforce a statute on the ground that federal law or federal regulations prohibit its enforcement. Cal. Pub. Util. Code § 1732 requires that a court challenge to a PUC order or decision be only on grounds previously raised in a petition to the PUC for a rehearing. Southern Pacific contends that the PUC could not have entertained the federal questions presented here because of article III, § 3.5, and that the state Supreme Court therefore could not have entertained them because of § 1732. It cites *Southern California Gas Co. v. Pub. Util. Comm'n*, 24 Cal. 3d 653, 156 Cal. Rptr 733, 596 P.2d 1149 (1979), as authority for this novel construction.

But *Southern California Gas* does not mention article III, § 3.5. (It is possible—though the opinion leaves this uncertain—that article III, § 3.5 was enacted only *after* the petition for rehearing was filed.) There is no authority for the absurd proposition that the California Supreme Court is now, as a side-effect of article III, § 3.5, divested of the power to consider federal constitutional provisions in reviewing PUC orders, or that it is divested of the power to determine whether the PUC has exceeded its jurisdiction. Certainly, Southern Pacific did not seem to feel that it was precluded from raising these issues in its petition to the state Supreme Court. And having done so, it should not now be heard to argue that that court lacked jurisdiction over the subject matter. *See* Restatement, Second, Judgments § 12, Comment (d). Moreover, it is doubtful that Southern Pacific would even have been precluded by article III, § 3.5 from having the federal questions determined in the PUC proceedings, since it was not, strictly speaking, asking the PUC to declare a statute unconstitutional or unenforceable, but asserting federal defenses, including preemption. There is nothing in § 3.5 that precludes a party from raising defenses that it may then reassert on review.

(1951) (ultimate review of federal questions by United States Supreme Court was an adequate safeguard).

There are certain circumstances in which overriding considerations of public policy require that final state court judgments adjudicating federal questions not be given res judicata effect in a subsequent action in federal court. For example, in *Red Fox* v. *Red Fox*, 564 F.2d 361 (9th Cir. 1977), the court, while acknowledging that 28 U.S.C. § 1738 ordinarily requires that federal courts respect the res judicata effect of state court judgments on subsequent federal-law claims, recognized that "the implementation of federal statutes representing countervailing and compelling federal policies justifies departures from a strict application of that rule." *Id.* at 365 n.3. It went on to hold that because of the American Indian's "peculiar and protected status" in the eyes of Congress, the Indian Civil Rights Act, 25 U.S.C. §§ 1301 et seq., is one such stature, and therefore a "transparently erroneous" state court determination of a claim cognizable under the Indian Civil Rights Act will not preclude a subsequent federal court action, if preclusion would result in a "miscarriage of justice." *Id.* at 365. *See also Brown v. Felsen*, 442 U.S. 127 (1979) (section 17 of the Bankruptcy Act of 1898, formerly 11 U.S.C. § 35); *Gunther* v. *Iowa State Men's Reformatory*, 612 F.2d 1079 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980) (Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e et seq.), *disapproved in Kremer* v. *Chemical Construction Corp.*, U.S. , 102 S.Ct. 1883 (1982); *American Mannex Corp.* v. *Rozands*, 462 F.2d 688 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972) (dictum—federal tax statutes); *Mach-Tronics, Inc.* v. *Zirpoli*, 316 F.2d 820 (9th Cir. 1963) (dictum—Sherman Anti-Trust Act, 15 U.S.C. §§ 1 et seq., Clayton Act, 15 U.S.C. §§ 12 et seq.).

However, "the intention of Congress to make such an exception [to 28 U.S.C. § 1738] should not be readily inferred." Restatement, Second, Judgments § 86, Comment (d). *See also Kremer* v. *Chemical Construction Corp.*, 012 S.Ct. at 1890. Application of this exception to the traditional res judicata doctrine is "rare," 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶ 0.405[11] at 784, 786 (2d ed. 1982), and

may become even more so after the Supreme Court's sharp disavowal of public policy-based erosions of the res judicata principle in *Federated Department Stores* v. *Moitie*, 452 U.S. 394, 401 (1981). And there has been no showing in this case that any public policy or Congressional purpose requires relitigation by a federal district court of the federal questions.[3] Rather, the contrary appears to be true. *See Allegheny Airlines, Inc.* v. *Pennsylvania Public Utility Commission*, 465 F.2d 237 (3r Cir. 1972), *cert. denied*, 410 U.S. 943 (1973); *State of California* v. *Oroville-Wyandotte Irrigation District*, 409 F.2d 532 (9th Cir. 1969); *Atlantic Coast Line Railroad* v. *City of St. Petersburg*, 242 F.2d 613 (5th Cir. 1957).

To permit such relitigation after a full opportunity was afforded Southern Pacific to present these issues to the California and United States Supreme Courts would risk encouraging dilatory tactics by unhappy litigants.

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[3] As Southern Pacific conceded in oral argument, section 214 of the Staggers Rail Act of 1980, 49 U.S.C. § 11501, permits state authorities to exercise regulatory jurisdiction over intrastate rail transportation, so long as they receive from the Interstate Commerce Commission certification of their standards and procedures. Therefore, it cannot be maintained that actions challenging the acts of these state authorities arise in an area of such inherent and exclusive federal concern that relitigation is warranted.

Of course, if the federal question brought before a federal court is one of which federal courts have exclusive jurisdiction, the plaintiff cannot be barred by res judicata as a consequence of a prior state court judgment. This is the import of some of the cases cited by Southern Pacific in its Reply Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction: *Kalb v. Feuerstein*, 308 U.S. 433 (1940) (Bankruptcy Act); *United States v. Ohio*, 487 F.2d 936, 943 (T.E.C.A. 1973), *aff'd sub nom. Fry v. United States*, 421 U.S. 542 (1975) (Economic Stabilization Act of 1970).

But because the California Supreme Court had jurisdiction to decide the federal questions in this case, see note 2, *supra*, these cases are inapposite. Other cases cited by Southern Pacific in its Reply Memorandum are inapposite for other reasons—e.g., because the federal statute involved called for some sort of federal review after review by the state authority *(North Carolina v. United States*, 210 F.Supp. 675, 679 (D.N.C. 1962), *rev'd on other grounds*, 376 U.S. 93 (1964)), or because the decision that was not given preclusive effect was a decision by a state administrative body that lacked jurisdiction over the subject matter *(Lightsey v. Harding, Dahm & Co.*, 623 F.2d 1219 (7th Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981); *Pennsylvania R.R. v. Sharfsin*, 369 F.2d 276 (3d Cir. 1966), *cert. denied*, 386 U.S. 982 (1967)).

For the foregoing reasons, the PUC's motion to dismiss under Fed. R. Civ. P. 12(b) will be deemed a motion for summary judgment under Fed. R. Civ. P. 56, and as such it is granted.

MARILYN HALL PATEL

Marilyn Hall Patel
United States District Judge

9 August 1982.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Defendant.

THE STATE OF CALIFORNIA, ACTING BY AND THROUGH THE DEPARTMENT OF TRANSPORTATION,
Intervenor.

No. C-82-3074 MHP
AMENDMENT TO ORDER FILED AUGUST 9, 1982

The order of this court filed August 9, 1982 is amended as follows.

At page 1, lines 19-24 delete "The State of California has applied to intervene as a defendant. The court, having considered the memoranda and other papers submitted by the parties, and having heard oral argument on the motions, dismisses the action. It is therefore unnecessary to act on the application for intervention." Replace the deleted sentences by "The State of California has applied to intervene as a defendant, and this application, being unopposed, is granted. The

court, having considered the memoranda and other papers submitted by the parties, and having heard oral argument on the motions, dismisses the action."

MARILYN HALL PATEL

Marilyn Hall Patel
United States District Judge

11 August 1982.

Original
FILED
Nov. 3, 1982
Clerk, U.S. Dist. Court
San Francisco

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Nov. 3 5:12 PM '82
William L. Whittaker
Clerk
U.S. District Court
No. Dist. of CA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Defendant.

STATE OF CALIFORNIA, ACTING BY AND THROUGH THE DEPARTMENT OF TRANSPORTATION,
Intervenor-Defendant.

No. C-82-3074 MHP
ORDER

ENTERED IN CIVIL DOCKET NOV. 4, 1982

The Southern Pacific Transportation Company's motion for injunctive relief pending appeal came on this day pursuant to this Court's order shortening time of October 20, 1982. Malcolm T. Dugan appeared for plaintiff. Vincent MacKenzie appeared for defendant California Public Utilities Commission. O. J. Solander appeared for intervenor-defendant State of California, Department of Transportation.

Oral argument having been heard and the Court having reviewed all documents presented by the parties, and being advised in the premises, finds that

1. The status quo has changed substantially since SP filed its notice of appeal on August 19, 1982, e.g., the rail service has

commenced on October 18, 1982, several station facilities have been constructed and substantial expenditure of State funds has occurred, litigation has been commenced and conducted and is now pending in the State Court. Plaintiff's motion, therefore, does not fall within the contemplation of Fed.R.Civ.P. 62(c). *McClatchy Newspapers* v. *Central Valley Typo, etc.* (9th Cir. 1982) 686 F.2d 731, 735. The relief sought by this motion is not to maintain the status quo at the time of appeal, but is in the nature of a new action for injunctive relief.

The Court further finds:

a. Plaintiff is not likely to prevail on the merits of its appeal. Plaintiff failed to cite any new authority, state any new facts or make any arguments that persuade this Court to change its previous decision, as set forth in its August 9, 1982 order.

b. Plaintiff has not shown that the public interest favors the granting of the injunctive relief sought. Indeed, the opposing party to this action, the Public Utilities Commission of the State of California, created by the California Constitution, art. 12, is mandated to protect the public interest and deference should be given to its decision as being in the interest of the public.

c. The public interest, which has been determined by the State of California, supports continuation of the passenger rail service that began October 18, 1982.

For the foregoing reasons, plaintiff's motion for injunction pending appeal is denied.

Dated: November 3, 1982

MARILYN HALL PATEL

Marilyn Hall Patel
United States District Judge

FILED
NOVEMBER 12, 1982
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF
APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Plaintiff-Appellant,
vs.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Defendant-Appellee,
and
THE STATE OF CALIFORNIA acting by and through the DEPARTMENT OF TRANSPORTATION,
Intervenor-Appellee.

No. 82-446

DC# CV 82-3074 MHP
Northern California

ORDER

Before: FARRIS and NELSON, Circuit Judges

Appellant's emergency motion for injuction pending appeal is denied. In addition to the jurisdictional statement required by 9th Cir. R. 13(b)(1)(A), the parties shall discuss the district court's subject matter jurisdiction over this action as an issue in the appeal. *See Miller-Wohl Co., Inc.* v. *Commissioner of Labor and Industry,* 685 F.2d 1088 (9th Cir. 1982); *Smart* v. *First Federal Savings & Loan Ass'n of Detroit,* 500 F. Supp. 1147 (E.D.Mich. 1980).

SUPREME COURT
FILED
DEC. 23, 1981
LAURENCE P. GILL, CLERK

Deputy

ORDER DENYING WRIT OF REVIEW

S.F. No. 24220

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

IN BANK

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

THE PUBLIC UTILITIES COMMISSION, ETC.,
Respondent;

COUNTY OF LOS ANGELES et al.,
Real Parties in Interest.

Petition for writ of review DENIED.

BIRD

Chief Justice

SUPREME COURT
FILED
DEC 23 1981
LAURENCE P. GILL, Clerk

Deputy

ORDER DENYING WRIT OF REVIEW

S. F. No. 24316

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA
IN BANK

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

THE PUBLIC UTILITIES COMMISSION, etc.,
Respondent;

COUNTY OF LOS ANGELES et al.,
Real Parties in Interest.

Petition for writ of review DENIED.

BIRD
Chief Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF TEXAS AND RAILROAD COMMISSION OF TEXAS, et al

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, et al

CIVIL ACTION
No. A-80-CA-487

ORDER

Came on for consideration this date the following motions for judgment on the pleadings, summary judgment, and partial summary judgment filed in this cause.

Title of Motion	Date Filed
Defendants' Motion for Judgment on the Pleadings	March 9, 1981
Defendants' Motion for Judgment on the Pleadings	March 10, 1981
Motion of Intervenor-Defendant Association of American Railroads for Summary Judgment	March 11, 1981
Motion for Summary Judgment of Intervenor-Defendants the Atchison, Topeka and Santa Fe Railway Company, et al.	March 12, 1981
Plaintiffs' Motion for Summary Judgment	April 21, 1981
Plaintiff-Intervenor's Motion for Partial Summary Judgment	April 21, 1981
Motion for Summary Judgment (State of Florida)	June 4, 1981
Motion for Summary Judgment (Florida Railroads)	July 7, 1981

Title of Motion	Date Filed
Plaintiff-Intervenor's Motion for Partial Summary Judgment	November 24, 1981
Defendant-Intervenor Association of American Railroads' Motion to Dismiss or, in the Alternative, for Partial Summary Judgment as to Plaintiff Intervenor Illinois' Third Cause of Action	December 28, 1981

Having carefully considered the grounds for said motions and the parties' responses thereto, together with all of the briefs and documents on file in this cause, and having heard extensive oral arguments on the motions, the Court is of the opinion, for the reasons ably presented in the briefs and arguments of Defendants and Defendants-Intervenors, that Defendants and Defendants-Intervenors are entitled to judgment in their favor as a matter of law, and that those above-cited motions filed by Defandants and Defendants-Intervenors should be granted, and that those above-cited motions filed by Plaintiffs and Plaintiffs-Intervenors should be denied. The Court notes that pursuant to Fed. R. Civ. P. 12(c), it has treated all motions for judgment of the pleadings as motions for summary judgment after notifying the parties and affording them an opportunity to present all material made pertinent to a motion for summary judgment under Rule 56.

It is therefore ORDERED that the following motions are hereby GRANTED:

Title of Motion	Date Filed
Defendants' Motion for Judgment on the Pleadings	March 9, 1981
Defendants' Motion for Judgment on the Pleadings	March 10, 1981
Motion of Intervenor-Defendant Association of American Railroads for Summary Judgment	March 11, 1981
Motion for Summary Judgment of Intervenor-Defendants the Atchison, Topeka and Santa Fe Railway Company, et al.	March 12, 1981

Title of Motion	Date Filed
Motion for Summary Judgment (Florida Railroads)	July 7, 1981
Defendant-Intervenor Association of American Railroads' Motion to Dismiss or, in the Alternative, for Partial Summary Judgment as to Plaintiff Intervenor Illinois' Third Cause of Action	December 28, 1981

It is further ORDERED that the following motions are hereby DENIED:

Title of Motion	Date Filed
Plaintiffs' Motion for Summary Judgment	April 21, 1981
Plaintiff-Intervenor's Motion for Partial Summary Judgment	April 21, 1981
Motion for Summary Judgment (State of Florida)	June 4, 1981
Plaintiff-Intervenor's Motion for Partial Summary Judgment	November 24, 1981

It is further ORDERED that the above-titled and numbered cause is hereby DISMISSED WITH PREJUDICE.

SIGNED AND ENTERED this 3rd day of November, 1982.

JAMES R. NOWLIN

James R. Nowlin
United States District Judge

450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIF. 94102
(415) 556-3031
27 OCT 1983
WILLIAM L. WHITTAKER
CLERK

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OFFICE OF THE CLERK

CASE NUMBER: C-82-3074 MHP

CASE TITLE: Southern Pacific Transportation Co. v. Public Utilities Commission of CA.

DATE MANDATE FILED: 10-24-83

TO COUNSEL OF RECORD:

The mandate of the United States Court of Appeals for the Ninth Circuit has been filed in the above captioned case.

Yours very truly,
WILLIAM L. WHITTAKER, *Clerk*
Case Systems Administrator

Distribution:	Civil	—Counsel of Record
	Criminal	—Counsel of Record
		U.S. Marshal (Copy of Mandate)
		U.S. Probation Office

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF TEXAS—AUSTIN DIVISION

CIVIL ACTION FILE NO. A-80-CA-487

THE STATE OF TEXAS AND
RAILROAD COMMISSION OF TEXAS
vs.
UNITED STATES OF AMERICA, et al

JUDGMENT

This action came on for trial before the Court, Honorable James R. Nowlin, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged the Summary Judgment is GRANTED for Defendants and Defendant-Intervenors; that Summary Judgment is DENIED for Plaintiffs and Plaintiff-Intervenors; FURTHER ORDERED that this titled and numbered cause is hereby DISMISSED WITH PREJUDICE.

Dated at Austin, Texas, this 3rd day of November, 1982.

CHARLES W. VAGNER
Clerk of Court

By _____
Deputy Clerk

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ORIGINAL
FILED
Aug 10 1982
WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT
OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Defendant.

No. C-82-3074

JUDGMENT
Fed. R. Civ. P. 58

This action having come before this court, the Honorable Marilyn Hall Patel, United States District Judge, presiding, and the issues having been duly presented and an Order having been duly filed herein,

IT IS ORDERED AND ADJUDGED that defendant's motion to dismiss, deemed a motion for summary judgment, is granted.

MARILYN HALL PATEL

Marilyn Hall Patel
United States District Judge

10 August 1982.

The Constitution of the United States

Art. I, Section 8. [1] The Congress shall have Power:

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. As amended Oct. 21, 1976, Pub.L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, Pub.L. 96-486, § 2(a), 94 Stat. 2369.

The Interstate Commerce Act, including the Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895.

49 U.S.C. § 10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation. Added Pub.L. 96-448, Title I, § 101(a), Oct. 14, 1980, 84 Stat. 1897.

§ 10501. General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

(1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—

(A) only by railroad;

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment; or

(C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil; and

(2) to the extent such jurisdiciion is not limited by subsection (b) of this section or the extent the transportation is in the United States and is between a place in—

(A) a State and a place in another State;

(B) the District of Columbia and another place in the District of Columbia;

(C) a State and a place in a territory or possession of the United States;

(D) a territory or possession of the United States and a place in another such territory or possession;

(E) a territory or possession of the United States and another place in the same territory or possession;

(F) the United States and another place in the United States through a foreign country; or

(G) the United States and a place in a foreign country.

(b) The Commission does not have jurisdiction under subsection (a) of this section over—

(1) the transportation of passengers or property, or the receipt, delivery, storage, or handling of property, entirely in a State (other than the District of Columbia) and not transported between a place in the United States and a place in a foreign country except as otherwise provided in this subtitle; or

(2) transportation by a water common carrier when that transportation would be subject to this subchapter only because the water common carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, a switching, terminal, lighterage, car rental, trackage, handling, or other charge by a rail carrier for services in the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(c) This subtitle does not affect the power of a State, in exercising its police police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission udner this subchapter unless (1) the transportation is deemed to be subject to the jurisdiction of the Commission pursuant to section 11501(b)(4)(B) of this title, or (2) the State requirement is inconsistent with an order of the Commission issued under this subtitle or is prohibited under this subtitle.

(d) The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to

administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.
Pub.L. 95—473, Oct. 17, 1978, 92 Stat. 1359; Pub.L. 96—448, Title II, § 214(c)(3)—(5), Oct. 14, 1980, 94 Stat. 1915.

§ 11501. Interstate Commerce Commission authority over intrastate transportation

(a) The Interstate Commerce Commission shall prescribe the rate, classification, rule, or practice for transportation or service provided by a carrier subject to the jurisdiction of the Commission under subchapter IV of chapter 105 of this title when the Commission finds that a rate, classification, rule, or practice of a State causes—

(1) between persons or localities in intrastate commerce and in interstate and foreign commerce, unreasonable discrimination against those persons or localities in interstate or foreign commerce; or

(2) unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.

(b)(1) A State authority may only exercise jurisdiction over intrastate transportation provided by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle.

(2) Within 120 days after the effective date of the Staggers Rail Act of 1980, each State authority exercising jurisdiction over intrastate rates, classifications, rules, and practices for intrastate transportation described in paragraph (1) of this subsection shall submit to the Commission the standards and procedures (including timing requirements) used by such State authority in exercising such jurisdiction.

(3)(A) Within 90 days after receipt of the intrastate regulatory rate standards and procedures of a State authority

under paragraph (2) of this subsection, the Commission shall certify such State authority for purposes of this subsection if the Commission determines that such standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this title. If the Commission determines that such standards and procedures are not in such accordance, it shall deny certification to such State authority, and such State authority may resubmit new standards and procedures to the Commission for review in accordance with this subsection.

(B) The standards and procedures existing in each State on the effective date of the Staggers Rail Act of 1980 for the exercise of jurisdiction over intrastate rail rates, classifications, rules, and practices shall be deemed to be certified by the Commission from that date until the date an initial determination is made by the Commission under subparagraph (A) of this paragraph.

(4)(A) Any State authority which is certified by the Commission under this subsection may use its standards and procedures in exercising jurisdiction over intrastate rail rates, classifications, rules, and practices during the 5-year period commencing on the date of such certification. Any State authority which is denied certification or which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices until it receives certification under this subsection.

(B) Any intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule, or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(5)(A) Certification of a State authority under this subsection is valid for the 5-year period beginning on the date of such certification. Prior to the expiration of such 5-year period, the State authority shall resubmit its intrastate regulatory standards procedures to the Commission for subsequent certification in accordance with this subsection.

(B) During any 5-year certification period, a State may not change its certified standards and procedures without notifying and receiving express approval from the Commission.

(6) Notwithstanding any other provision of this subtitle, a State authority may not exercise any jurisdiction over general rate increases under section 10706 of this title, inflation-based rate increases under section 10712 of this title, or fuel adjustment surcharges approved by the Commission.

(c) Any rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may petition the Commission to review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of this subtitle. The Commission shall take final action on any such petition within 30 days after the date it is received. If the Commission determines that the standards and procedures were not in accordance with the provisions of this subtitle, its order shall determine and authorize the carrier to establish the appropriate rate, classification, rule, or practice.

(d)(1) The Commission has exclusive authority to prescribe an intrastate rate for transportation provided by a rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title when—

(A) a rail carrier files with an appropriate State authority a change in an intrastate rate, or a change in classification, rule, or practice that has the effect of changing an intrastate rate, that adjusts the rate to the rate charged on similar traffic moving in interstate or foreign commerce; and

(B) the State authority does not act finally on the change by the 120th day after it was filed.

(2) When a rail carrier files an application with the Commission under this subsection, the Commission shall prescribe the intrastate rate under the standards of subsection (a)

of this section and chapter 107 of this title. Notice of the application shall be served on the State authority.

(e)(1) The Commission shall prescribe any rate, rule, or practice applicable to transportation provided entirely in one State by a motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title—

(A) if the carrier has requested the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice for permission to establish such rate, rule, or practice and the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request; and

(B) if the Commission finds that the rate, rule, or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.

(2) For purposes of paragraph (1)(B) of this subsection, there shall be a rebuttable presumption that—

(A) any rate, rule, or practice applicable to transportation provided by a motor common carrier of passengers entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds—

(i) that such rate, rule, or practice results in the carrier charging a rate for such transportation which is lower than the rate such carrier charges for comparable interstate transportation of passengers;

(ii) on the basis of evidence presented by the carrier, that as a result of such rate, rule, or practice such carrier does not receive revenues from such transportation which exceed the variable costs of providing such transportation; or

(iii) that the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice failed to act finally (in

whole or in part) on the request of the carrier to establish such rate, rule, or practice by the 120th day after the date the carrier made the request; and

(B) any rate applicable to transportation entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds that the most recent general rate increase applicable to transportation provided by motor common carriers of passengers in such State is less than the most recent general rate increase applicable to interstate transportation provided by motor common carriers of passengers under this subtitle.

(3)(A) A motor common carrier of passengers must file an application with the Commission for prescription under this subsection of a rate, rule, or practice applicable to transportation provided entirely in one State by such carrier. When such application is filed with the Commission, the carrier shall certify that he has notified (i) the Governor of such State, (ii) the department, agency, or instrumentality of such State which denied, or failed to take action on, the request of such carrier related to such rate, rule, or practice, and (iii) such other interested persons as the Commission may specify by regulation. The Commission shall take final action on any such application not later than 60 days after such application is filed with the Commission.

(B) The Commission shall establish, by regulation, procedures for processing applications under this subsection.

(4) This subsection shall not apply to any carrier owned or controlled by a State or local government.

(5) No State or political subdivision thereof and no interstate agency of other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provisions having the force and effect of law relating to scheduling of interstate or intrastate transportation provided by motor common carrier of passengers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title on an authorized interstate route or relating to the implementation of any reduction in the rates for such trans-

portation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This paragraph shall not apply to intrastate commuter bus operations.

(6)(A) No motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission may charge or collect a rate for intrastate service provided on an authorized interstate route which constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title.

(B) When the Commission decides, upon complaint by any person, that a reduction in a rate charged or collected by such a motor common carrier of passengers for intrastate service provided on an authorized interstate route constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title, the Commission shall prescribe the rate applicable to such service.

(f) The Commission may take action (1) under this section only after a full hearing, or (2) with respect to a rate, rule, or practice of a motor common carrier of passengers, in accordance with the procedures established by the Commission under subsection (e)(3)(B) of this section. Action of the Commission under this section supersedes State law or action taken under State law in conflict with the action of the Commission.

Pub.L. 95—473, Oct. 17, 1978, 92 Stat. 1444; Pub.L. 96—448, Title II, § 214(a)—(c)(1), Oct. 14, 1980, 94 Stat. 1913; Pub.L. 97—261, § 17(a), Sept. 20, 1982, 96 Stat. 1117.
Enacted 1872.

CALIFORNIA PUBLIC UTILITIES CODE

§ 1732. Contents of application

The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application.

§ 1756. Time for application for review to Supreme Court: Return of writ: Certification of record

Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified.

Decision No. 93391

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, *Complainants,* v. SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation, *Defendant.*	Case No. 10575

ORDER DENYING REHEARING

A petition for rehearing of Decision No. 93211 has been filed by the State of California Department of Transportation (Caltrans). An Answer thereto has been filed by Southern Pacific Transportation Company. We have considered each and every allegation raised therein and are of the opinion that good cause for granting rehearing has not been shown. Therefore,

IT IS ORDERED that rehearing of Decision No. 93211 is hereby denied.

This order is effective today.

Dated August 4, 1981, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

[County of Los Angeles and State of California, Real Parties in Interest]

SF No. 24316

PETITION FOR WRIT OF REVIEW WITH POINTS AND AUTHORITIES IN SUPPORT THEREOF

JOHN MACDONALD SMITH
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San Francisco, CA 94105
Attorneys for Petitioner
Southern Pacific
Transportation Company

Dated: July 16, 1981

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IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

[County of Los Angeles and State of California, Real Parties in Interest]

SF No.

PETITION FOR WRIT OF REVIEW WITH POINTS AND AUTHORITIES IN SUPPORT THEREOF

TO THE HONORABLE ROSE E. BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Southern Pacific Transportation Company ("SP") respectfully requests this Court to inquire into and determine the lawfulness of Decision No. 92862 of the Public Utilities Commission of the State of California ("Commission") issued April 7, 1981. Decision 92862 was issued in CPUC 10575, *County of Los Angeles, State of California* v. *Southern Pacific Transportation Company*, wherein the State of California Department of Transportation ("Caltrans") seeks an order requiring SP to institute rail commuter service between Oxnard, California and

Los Angeles Union Passenger Terminal in Los Angeles, California. This petition is related to and arises out of the same proceedings as the Petition for Writ of Review filed by SP on October 3, 1980 in SF No. 24220.

I. JURISDICTION OF THE COURT

This Court has jurisdiction pursuant to Section 1756 *et seq.* of the California Public Utilities Code to review decisions of the Commission.

II. THE STATUS OF THE PARTIES

Petitioner SP is a corporation existing under and by virtue of the laws of the State of Delaware. It is a railroad operating in several states, including California, in which it is a common carrier of freight over all of its lines throughout the state. SP is also a common carrier of passengers in portions of San Francisco, San Mateo, and Santa Clara Counties, California, in which it provides commuter services between San Francisco and San Jose, serving intermediate points.

Respondent Commission is an administrative agency of the State of California existing pursuant to Article XII of the California Constitution. It is charged with the duties and authorities conferred upon it by Article XII and by the California legislature under the California Public Utilities Code.

The County of Los Angeles ("County") and the State of California Department of Transportation ("Caltrans") are the complainants in the proceeding before the Commission and are, therefore, real parties in interest. A copy of this Petition is being served upon all counsel who represented the County and Caltrans and appeared on behalf of such parties in the proceeding before the Commission.

Greyhound Lines, Inc. ("Greyhound") is an intervenor in the Commission proceeding. It is a passenger stage corporation existing under and by virtue of the laws of California and operates bus service in several states including California, where it serves the cities of Oxnard and Los Angeles pursuant to Certificated Authority issued by respondent Commission.

III. STATEMENT OF THE CASE*

The County of Los Angeles and Caltrans filed a complaint on May 18, 1980, requesting the Commission to order SP to institute commuter train operations over its coastline of railroad between Oxnard (Ventura County) and Los Angeles (Los Angeles County). Hearings were held, and on June 3, 1980, the Commission issued Decision 91847 which ordered SP, over its vigorous objections, to institute the service. SP filed a Petition for Rehearing and the Commission in Decision 92230 issued September 3, 1980 granted a limited hearing, primarily on the issue of the operational feasibility of the service. Decision 92230 denied rehearing on the issue of dedication and failed to consider the proposed Greyhound service as an alternative service, one which encompasses both lower cost and greater fuel efficiency. Those two issues were raised in SP's Petition for Writ of Revew in SF 24220.

The limited rehearing was held but shortly after the rehearing was concluded, County, one of the original complainants in this proceeding, decided to withdraw from the proceeding. On December 23, 1980, its Board of Supervisors resolved to rescind its agreement with Caltrans to supply a County-owned train set to Caltrans for the commute service. On February 5, 1981, County voted to withdraw from the proceedings because the Board of Supervisors found that the service was no longer in the best interests of County's residents. (February 5, 1981, resolution; Exhibit G to SP's Supplement to Petition for Writ of Review in SF 24220 and Appendix C hereto). On February 19, 1981, County formally asked the Commission for permission to withdraw. SP and Greyhound, after learning of the Board's decision, had already made motions to the Commission to dismiss the proceedings, arguing that with the withdrawal of County there was no longer the requisite showing of public convenience and necessity.

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* A complete and detailed history of these proceedings was set forth in SP's Petition for Review in SF 24220 and thus will be only briefly summarized here. Additional proceedings since that Petition was filed are set forth below.

By its Decision 92862 issued April 7, 1981 (Appendix A hereto), the Commission granted County's motion to withdraw but denied SP's and Greyhound's motion to dismiss, finding that there was still "adequate public support"* for the service and that County's participation was not essential since Caltrans stated that it has agreed with Amtrak to furnish and maintain the necessary equipment*.

SP petitioned for rehearing of Decision 92862**. In its Petition for Rehearing and for Receipt of Additional Evidence filed May 7, 1981 (filed with this Court as Supplement to Petition for Writ of Review in SF 24220), SP argued that the Commission had erred when it refused to dismiss the complaint and that an "adequate" showing of public convenience and necessity is not sufficient to justify the institution of the service. It further presented new evidence that the federal support Caltrans had anticipated receiving is no longer available. In addition, on June 5, 1981, SP filed a Supplement to its Petition for Rehearing and for Receipt of Additional Evidence (Appendix D hereto), presenting a letter written by U.S. Representative Bobbi Fiedler to the Commission. Representative Fiedler represents the 21st District in California which includes the San Fernando Valley, a prime user-to-be of the service. She is the successor of Representative James Corman, who had initially stated that he supported the proposed service. In her letter, Representative Fiedler stated her "strong opposition" to the commute service on behalf of both the inhabitants and the industries in the San Fernando Valley. SP therefore requested the Commission to modify its finding of Congressional support in Decision 91847 to reflect the fact that her office no longer supports the proposed commuter service.

Decision 93211 (Appendix B hereto) denied SP's Petition for Rehearing of Decision 92862 without comment; indeed, the Commission made absolutely no reference to the public convenience and necessity issue in its decision. The Commission additionally rejected SP's Petition for Receipt of Additional Evidence.

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* Finding of Fact No. 2, Decision 92862 at p. 9.

* Finding of Fact No. 3, Decision 92862 at p. 9.

** SP simultaneously petitioned for rehearing of Decision 92863 which had affirmed Decision 91847 ordering SP to institute the requested commute service. Both petitions were denied by the Commission in Decision 93211 and Caltrans has petitioned for rehearing of certain portions of Decision 93211.

IV. GROUNDS FOR PETITION

Fundamental to the ordering of the commute service by the Commission is a finding of public convenience and necessity for the service. It was upon this basis that the original request for the service was predicated. With the withdrawal of County and its February 5 Resolution that public convenience and necessity would not be served by institution of the commute service and with Congresswoman Fiedler's express opposition to the service, the present record contains little evidence that any public convenience and necessity will be served at this time by the institution of the commute service. Therefore, the Commission erred as a matter of law in reaffirming its finding of public convenience and necessity in Decision 92862 and in denying SP's Petition for Rehearing of Decision 92862 in Decision 93211.

V. QUESTIONS PRESENTED

1. Did the Commission err in reaffirming its finding of public convenience and necessity in Decision 92862 in the face of the County's withdrawal of support and Congressional opposition to the service?

2. Did the Commission deny SP due process by refusing to consider the additional evidence SP submitted on the change in circumstances on both the local and national level?

Both questions must be answered in the affirmative.

WHEREFORE, SP prays that this Court:

1. Issue a Writ of Review with respect to Decision 92862 insofar as it relates to public conveniences and necessity;

2. Issue a Writ of Review with respect to Decision 93211 insofar as the Commission has unlawfully failed to consider new evidence on the issue of public convenience and necessity and has thereby denied SP due process on this issue;

3. Grant all other relief to SP as the Court may deem proper, including its costs of suit.

Dated at San Francisco, California this 16th day of July, 1981.

JOHN MACDONALD SMITH
CAROL A. HARRIS
ANN FINGARETTE HASSE
813 Southern Pacific Building
One Market Plaza
San Francisco, CA 94105

By ANN FINGARETTE HASSE

Attorneys for Petitioner
Southern Pacific Transportation Company

VERIFICATION

I, D. M. MOHAN, an Assistant to President, of Southern Pacific Transportation Company, Petitioner in the above-entitled matter. I have read the foregoing Petition for Writ of Review and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Francisco, California, this 16th day of July, 1981.

D. M. MOHAN

D. M. Mohan

Subscribed and sworn to before me this 16th day of July, 1981.

CATHERINE B. LUNDY

NOTARY PUBLIC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF REVIEW

1. Decision 92862 is Unlawful Because the Record Does Not Now Demonstrate the Necessary Public Convenience and Necessity for the Commute Service

The initial complaint filed by the County and Caltrans was premised on the contention that rail passenger commute service between Oxnard and Los Angeles is required by the public convenience and necessity. Public convenience and necessity is an "exacting standard" requiring a high level of proof (*Savage Transportation Co.*, 50 Cal. PUC 648, 649 (1951), and complainants have the burden of meeting that standard. *Crystal Springs Water Co.*, 61 Cal. PUC 329, 332 (1963)); *In Re Beverly Gibson*, 26 CRC 892, 894 (1925).

Initially, one of the primary bases for the proposed service was County's support of the service as expressed in large part by its role as one of the two complainants in these proceedings. Moreover, County had originally agreed, at the urging of former County Supervisor Baxter Ward, to give eight rail coaches to the service. Indeed, the only concrete support offered by any local agency in connection with the proposed service was County's; Ventura County's Board of Supervisors, for example, indicated in testimony at the initial hearings that it was unwilling to provide any funding for the service despite the fact that its inhabitants would be primary users. (Transcript, Initial Hearings, p. 199).

The Commission made findings in its initial Decision 91847 that the service had support at local, regional and national levels. (Findings 8 and 9, Decision 91847; Appendix to Petition for Writ of Review in SF 24220.) Since the initial hearings and the issuance of Decision 91847, the situation has substantially changed. County has withdrawn its agreement to supply the railcars to the service; more important, on February 5, 1981, the Board of Supervisors of County resolved to withdraw as a participant in these proceedings, specifically finding that the commute service "is unwarranted at this time."

The Board found that the service would "increase pollution" and that, "[C]onsequently, it is not in the best interest of the citizens of the County of Los Angeles to continue to participate in this action." (Appendix C hereto.)

The national situation has changed as well. Congresswoman Fiedler, representing the Twenty-First Congressional District (which includes the San Fernando Valley, one of the major areas for the commute service) informed the Commission by letter of her strong opposition to the service. Although her predecessor, James Corman, had supported the proposal, Representative Fiedler stated that the service "would be a disaster for the people of the [San Fernando] Valley at this time." (Appendix D hereto.) She noted in her letter that federal budgetary considerations have changed since the complaint was first filed in this proceeding. As SP showed in its Petition for Rehearing and for Receipt of Additional Evidence (Supplement to Petition for Writ of Review in SF 24220), Caltrans had shown in its initial budget that it was relying on federal subsidies from the Urban Mass Transit Administration (UMTA). UMTA's budget has since been dramatically slashed. Indeed, UMTA does not plan to get involved in funding local service. (See Exhibit I to Supplement to Petition for Writ of Review in SF 24220.)

Upon County's motion to withdraw, SP urged the Commission to reassess its findings of public convenience and necessity and dismiss the complaint. In response to SP's motion, the Commission found in Decision 92862 that, despite County's withdrawal, there was an "adequate" showing of public support for the service. (Finding No. 2, Decision 92862) That finding, even if factually correct, is legally insufficient to support a finding of public convenience and necessity. The record must be "free from doubt or conflict, that the proposed [service], if authorized, will meet some definite public demand." *In Re Beverly Gibson*, 26 CRC 892, 894 (1925). If there is a "substantial conflict" in the evidence, the matter must be resolved against the complainant. *Bay Cities Transportation Co.* v. *E. H. Warren*, 26 CRC 131, 134 (1925).

The present record *at most* presents a substantial conflict over the degree of public support for the proposed commute service. The Commission therefore erred in Decision 92862 when it denied SP's and Greyhound's motions to dismiss the complaint, and it further erred when it denied rehearing on Decision 92862 in Decision 93211.

2. The Commission Denied SP Due Process When It Failed to Accept or Consider the New Evidence Presented by SP on the Issue of Public Convenience and Necessity

After the Commission denied SP's motion to dismiss the complaint in its Decision 92862, SP filed a Petition for Rehearing and for Receipt of Additional Evidence (filed with this Court as Supplement to Petition for Writ of Review in SF 24220, hereafter cited as "Supplement"). In that Petition, SP introduced evidence of future federal budget cuts affecting UMTA, the national transportation agency; SP introduced further evidence that, as a result of budget cuts and change in national policy, UMTA will no longer fund local transportation services (Exhibits H and I, Supplement). In addition, SP offered Congresswoman Fiedler's letter of May 28, 1981 (Appendix D hereto) in which, in contrast to her predecessor, she states her strong opposition to the proposed commute service. SP offered her letter as further evidence of the change in attitude on both the federal and local levels toward the proposed commute service. In addition, SP stressed the February 5, 1981 Resolution of County stating that the service was not in the best interests of County's residents; the Resolution had not been mentioned by the Commission in its Decision 92862 in which it found "adequate support" for the service.

Although all this evidence clearly goes toward the key issue of the public convenience and necessity for the commute service, the Commission denied receipt of that evidence in Decision 93211 without comment, failing even to mention the issue in its Decision, and denied rehearing on Decision 92862. Given the enormous investment that Caltrans is contemplating if the service is instituted, *any* change in attitude on either the local or national level toward the service is of critical importance. If few people favor the service, there is no justification for spending the taxpayers' money to fund it.

Under the Commission's own decisions, the Commission is required to consider all the evidence and all the public interests affected by the proposed service before making a decision on public convenience and necessity. *Andre Guiton,* 68 Cal. PUC 631, 638 (1958); *Air California,* 66 Cal. PUC 230, 233 (1966). Moreover, due process as guaranteed by the Fourteenth Amendment requires that the Commission review all relevant evidence.

Relevant evidence in an administrative hearing is evidence that a reasonable person might rely on in deciding serious matters. California Government Code § 11513.* The new evidence presented by SP was just such evidence and should have resulted in the Commission's granting SP's Petition for Rehearing. Since the Commission refused to grant a rehearing, this Court can require the Commission to do so.

Alternatively, this Court can reverse Decision 92862. This Court is specifically empowered to make new findings where there is a constitutional challenge to a Commission decision. California Public Utilities Code § 1760.* Here, SP was denied due process by the Commission's rejection of relevant evidence. In *Labor Board* v. *I. & M. Electric Co.,* 318 U.S. 9, 28 (1943), the Supreme Court said:

> "[T]he court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed."

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* California Government Code § 11513 specifically provides in pertinent part: "Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule . . ."

* California Public Utilities Code § 1760 provides in pertinent part: "In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

See, also, *N.L.R.B.* v. *St. Francis Hospital of Lynwood*, 601 F.2d 404, 417 (9th Cir. 1979). The Court should reassess the findings in Decision 92862 in light of all the evidence. If it does so, it will find as a matter of law that complainants have not sustained their burden of showing the necessary public convenience and necessity for the commute service.

CONCLUSION

The Commission erred as a matter of law in Decision 92862 in holding that "adequate support" for the requested service was sufficient to fulfill complainants' burden of proving the requisite public convenience and necessity, and Decision 92862 should therefore be reversed. Alternatively, pursuant to P.U.C. Code §1760, the Court can itself make findings based on all the evidence that complainants have failed to sustain their burden of demonstrating the necessary public convenience and necessity. In either case, because public convenience and necessity was the basis upon which the service was requested, the Court must then necessarily find that the Commission cannot order the proposed commute service.

Dated at San Francisco, California, this 16th day of July, 1981.

JOHN MACDONALD SMITH
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813 Southern Pacific Building
One Market Plaza
San Francisco, CA 94105

By ANN FINGARETTE HASSE

Attorneys for Petitioner
Southern Pacific Transportation Company

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I am a citizen of the United States, over the age of 18 years, with business address at Southern Pacific Building, One Market Plaza, San Francisco, California 94105, and am not a party to nor interested in *Southern Pacific Transportation Company* v. *The Public Utilities Commission of the State of California*, S.F. No. 24220 before the Supreme Court of California.

On July 16, 1981, in San Francisco, California, I personally deposited in the United States mail copies of the attached Petition For Writ Of Review With Points And Authorities In Support Thereof addressed as follows:

Janice E. Kerr
Hector Anninos
Anne K. Mester
E. Nicholas Selby
5066 State Building
San Francisco, CA 94102

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1015—15th Street
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Each copy was enclosed in a sealed envelope and all postage thereon fully prepaid.

I certify under penalty of perjury that the foregoing is true and correct.

TERRI A. BROWN

Terri A. Brown

S.F. No. 24316

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent,

COUNTY OF LOS ANGELES AND THE STATE OF CALIFORNIA,
Real Parties in Interest.

RESPONDENT'S ANSWER IN OPPOSITION TO PETITION FOR WRIT OF REVIEW

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August 14, 1981

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S.F. No. 24316

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,
vs.
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent,
COUNTY OF LOS ANGELES AND THE STATE OF CALIFORNIA,
Real Parties in Interest.

RESPONDENT'S ANSWER IN OPPOSITION TO PETITION FOR WRIT OF REVIEW

TO THE HONORABLE ROSE ELIZABETH BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The respondent Public Utilities Commission of the State of California (hereinafter, Commission) hereby respectfully submits its Answer in opposition to the petition for writ of review of Southern Pacific Transportation Company (hereinafter, SP), and denies that SP is entitled to have said writ granted.

ISSUES PRESENTED

This case is a companion case to S.F. 24220,[1] in which SP challenges Commission Decision No. 91847. In Decision No. 91847, the Commission ordered SP to reinstitute passenger rail service between Oxnard and Los Angeles. Decision No. 91847 has now been modified and amended by four decisions, Nos. 92230, 92862, 92863 and 93211. In this case SP challenges Decision Nos. 92862 and 93211.

This case presents three questions.

First, in view of its findings of fact concerning popular support, ridership projections, state subsidies, and endorsements from governmental officials and planning agencies, did the Commission abuse its discretion in Decision No. 92862 by reaffirming its finding in Decision No. 91847 that public convenience and necessity require Oxnard-Los Angeles rail passenger service, despite the withdrawal of Los Angeles County as a complainant in Case No. 10575 and the opposition, by letter, of a local Congresswoman?

Second, in view of its findings on adequate and existing state funding, did the Commission deny SP due process by refusing in Decision No. 93211 to receive into the record the Congresswoman's letter and certain new exhibits proffered by SP related to potential federal funding?

Third, does the fact that the Commission has not sought certification from the Interstate Commerce Commission (ICC) pursuant to the terms of the Staggers Rail Act of 1980 (P.L. 96-448) bar the Commission from requiring SP to provide the rail passenger service ordered in Decision No. 91847?

The Commission respectfully submits that the answer to each of these questions is no.

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[1] The Commission is uncertain why SP's Petition for Writ of Review has been given a docket number other than S.F. 24220, but in any case suggests that the Court consolidate S.F. 24220 and S.F. 24316.

STATEMENT OF FACTS

Decision No. 91847, as now modified and amended by Decision Nos. 92230, 92862, 92863 and 93211, orders SP to provide passenger train service between Los Angeles and Oxnard. The Court is respectfully referred to the Statement of Facts in the Commission's Answer in S.F. 24220, which is incorporated here by this reference.

After hearing, the Commission found that extensive use of the private automobile has contributed to traffic congestion, environmental deterioration, and unwise energy consumption and land use, and that state and national policy favors expanded mass transit service. (Decision No. 91847, Finding of Fact Nos. 7 and 8, p. 70). The Commission also found that "Regional and local governmental officials and planning agencies support and encourage commuter rail service in the corridor between Los Angeles and Oxnard." (*Ibid.*, Finding 9). The Commission found that a significant number of public witnesses supported the proposed service and that it was reasonable to expect that from 1,100 to 1,400, or more, passengers per day would use the train between Los Angeles, Oxnard and intermediate stops. (*Id.*, Finding Nos. 10 and 11, p. 71). Based on these and other findings, the Commission found that public convenience and necessity require SP to reinstitute rail passenger service. (*Id.*, Finding 12).

Subsequent to the issuance of Decision Nos. 91847 and 92230, Los Angeles County (County), originally a co-complainant with the California Department of Transportation (Caltrans), moved to withdraw as a complainant in Commission Case No. 10575. This motion was based upon the vote to withdraw of the County's Board of Supervisors, on which Supervisor Baxter Ward, a proponent of the rail project, had been replaced by the motion's author, Supervisor Michael Antonovich, after the November, 1980 elections. Shortly thereafter, SP moved to dismiss Case No. 10575, principally on the allegation that the County's withdrawal doomed the rail passenger service to failure. The County's motion to withdraw was granted and SP's motion to dismiss was denied in Decision No. 92862.

Regarding SP's motion to dismiss, the Commission's findings of fact were that: 1) there is substantial evidence in the record from regional and local officials and planning agencies on the issue of public convenience and necessity, 2) there is adequate public support from entities other than the County to show that the proposed service is needed, and 3) withdrawal of the County as a complainant did not affect the establishment of the rail commuter service ordered in Decision No. 91847, because Caltrans would be solely responsible for the furnishing and maintenance of the operating equipment and station facilities necessary to perform the service. (Decision No. 92862, Findings 1 through 3, p. 9). Accordingly, SP's motion to dismiss was denied.

Following the issuance of Decision Nos. 92862 and 92863, SP again petitioned for rehearing, and in support of its petition submitted nine exhibits. (Copies of the petition and the exhibits, A through I, were supplied by SP to the Court). A later supplement to that petition contained Congresswoman Bobbi Fiedler's letter to the Commission's Executive Director. (This letter is now attached to SP's Petition for Writ of Review in S.F. 24316 as "Exhibit A to Appendix D"). In response to that Petition for Rehearing, and particularly in response to Exhibits A through F attached thereto, the Commission issued Decision No. 93211, which further modified Decision No. 91847, but denied rehearing.

Exhibit G to the Petition for Rehearing was a copy of the resolution of the Los Angeles County Board of Supervisors to withdraw the County as a complainant in Case No. 10575. This resolution (which was attached as an exhibit to Greyhound's motion to dismiss, which was denied in Decision No. 92862) was considered by the Commission prior to the issuance of Decision No. 92862. Exhibit H (a February, 1981 outline of President Reagan's economic program), Exhibit I (a copy of a speech allegedly delivered by an UMTA official), and the late-filed letter of Congresswoman Fiedler were not responded to in Decision No. 93211, except insofar as the Commission concluded they did not constitute good cause for granting rehearing.

ARGUMENT

I. THE COMMISSION DID NOT ERR IN REAFFIRMING ITS FINDING OF PUBLIC CONVENIENCE AND NECESSITY, DESPITE THE WITHDRAWAL OF LOS ANGELES COUNTY AND THE OPPOSITION OF CONGRESSWOMAN FIEDLER

In view of its findings of fact concerning popular support, ridership projections, state subsidies, and endorsements from governmental officials and planning agencies, the Commission did not abuse its discretion or otherwise err in Decision No. 92862 by reaffirming its finding in Decision No. 91847 that public convenience and necessity require Los Angeles-Oxnard rail passenger service, despite the withdrawal of Los Angeles County as a complainant in Case No. 10575 and the opposition, by letter, of Congresswoman Bobbi Fiedler.

It is within the discretion of the Commission to determine the factors material to public convenience and necessity. (*California Motor Transport Co.* v. *Public Utilities Com.* (1963) 59 Cal. 2d 270, 275). The chief requirements in the exercise of this discretion are: (1) the Commission must separately state its findings on those factors which it believes material to public convenience and necessity (*ibid.*); (2) those findings must be internally consistent with respect to the principal issue (*Cal. Portland Cement Co.* v. *Public Util. Com.* (1957) 49 Cal. 2d 171, 176), and (3) the findings must be supported by evidence in the record (see e.g., *California Manufacturers Assn.* v. *Public Utilities Com.* (1979) 24 Cal 3d 251, 260).[2] So long as they meet these requirements and do not betray a clear and obvious abuse of discretion, such findings are final and may not be overturned by this Court. (Public Util. Code, § 1757; *Cal. Portland Cement Co.* v. *Public Util. Com., supra,* at p. 176).

[2] As will be demonstrated, each of these requirements has been met in this case.

Such findings must demonstrate that the proposed project, service or facility answers some definite existing or future public need. (*Los Angeles Met. Transit Authority* v. *Public Utilities Com.* (1959) 52 Cal. 2d 655; *San Diego etc. Ferry Co.* v. *Railroad Com.* (1930) 210 Cal. 504; see also *Southern Pac. Co.* v. *Public Utilities Com.* (1953) 41 Cal. 2d 354). The particular 'public necessity' or 'definite need' is understood in " 'a relative sense . . . [and] . . . not . . . in . . . [the] . . . sense of 'indispensably requisite.' If it were no certificate of public convenience and necessity could ever be granted.' " (*Id.*, at p. 365).

SP contends that the record must be free from conflict on the question of the public's need for a particular project or service. (See SP's "Memorandum of Points and Authorities in Support of its Petition for Writ of Review," at p. 3). This claim is chiefly based upon SP's reading of a 1925 Commission decision, *In re Beverly Gibson*, 26 CRC 131, 134.

However, reliance upon that case is misplaced. It is not the law that Commission findings on public convenience and necessity will be overturned if there is a conflict in the record. In *Ferry Co.* v. *Railroad Com., supra,* 210 Cal. 504, the Automobile Ferry Company of Coronado sought a certificate of public convenience and necessity authorizing new ferry service to compete with an existing service. This Court noted that "the estimates of future business . . . submitted by engineers and other witnesses . . . were not in accord." (*Id.*, at p. 508). Despite the existence of this real conflict in the record, the Court upheld the Commission's issuance of a certificate, noting that the disagreement among the witnesses was only to "be expected in the ordinary course of such a hearing." (*Ibid.*). The conflict was sufficiently great that two commissioners dissented, yet still the order was upheld, the court seeing the dissents as simply evidence that "reasonable minds might differ." (*Id.*, at 513). The Court observed that the "discretion of the Commission in such matters is very broad." (*Ibid.*).

In this case the requirements for the Commission's findings on public convenience and necessity are fully satisfied. First, in Findings 7 through 11 in Decision No. 91847 and Findings 1 through 3 on page 9 in Decision No. 92862, the factors which the Commission believes material are separately identified, as noted above in the Statement of Facts. That a definite public need is being answered is demonstrated by the ridership projection that 1,100 to 1,400 persons per day will use the service. Second, those findings are consistent with each other, despite the withdrawal of Los Angeles County and the opposition of Congresswoman Fiedler, in view of, third, the ample evidence in the record which supports these findings. That evidence will now be set forth.

Testimony[3] in support of the proposed passenger rail service between Los Angeles and Oxnard is in the record from (in order of their appearance): Mr. Michael Ayer, a public citizen (99-107),[4] Mr. Allan Kreman, a public citizen (107-109); Mr. John Garrity, a public citizen (160-167); Ginger Gherardi, a former member of the Simi Valley City Council who served on the Ventura County Association of Governments' Transportation Policy Planning Committee and a member of the League of California Cities Transportation Committee (177-184); Carroll Lang, Chairman of the Council on Aging in the City of Simi Valley (184-188); Albert F. Knuth, transportation and traffic engineer for Ventura County, who sponsored Exhibit 4, the Resolution of the Board of Supervisors

[3] In addition to the testimony, which was sworn and subject to cross-examination, the Commission heard public statements in support of the project from 73 persons, including the Mayor Pro Tem of Simi Valley, a Ventura County Supervisor, a member of the Ventura County Planning Commission, a member of the Oxnard City Council (who recounted its unanimous support), a member of the Simi Valley Chamber of Commerce, a member of the Simi Valley Youth Council, the Director of the Public Works Department in Simi Valley, a member of the Ventura County Planning Commission, a former Mayor of Oxnard, the Assistant Los Angeles City Attorney in charge of Environmental Projection, and Congressman James Corman. One person, a member of the City Council of Camarillo, spoke against the project.

[4] The citations are to the pages of the Commission's hearing transcript in Case No. 10575.

of Ventura County in support of the proposed project based on the request for such a resolution from the Ventura County Association of Governments (196-200); Jan Bush, Director of the Ventura County Air Pollution Control District (205-212); Cathie Wright, Mayor of Simi Valley (216-223); Mr. George Phillips, a public citizen (227-229); Michael Sedell, of the Simi Valley City Manager's office, who testified, among other things, about the difficulty of obtaining public transportation into Los Angeles (244-252); Adriana Gianturco, Director of the California Department of Transportation (Caltrans) (Exhibit 8 and 265-277); George Gray, chief of Caltrans' Division of Mass Transportation, who testified, among other things, about the existence of state funding for the first two and a half years of the proposed service and the possibility of the project's qualifying for additional federal funding one year after initiation of service (Exhibits 9 and 10 and 277-333); Baxter Ward, at that time a member of the Los Angeles County Board of Supervisors (Exhibits 11 through 17 and 347-405); Joseph Browne, chief of the Transit Development Branch of Caltrans, who sponsored Exhibits 18, 19 and 20, in which he developed his conservative estimate that from 1,100 to 1,400 riders per day would use the proposed rail service, based on the Los Angeles Regional Transportation Study (LARTS) model, and who testified concerning the support for the project from the Southern California Association of Governments (Exhibits 18 and 19 and 405-465 and 471-485); Jerome Premo, Executive Director of the Los Angeles County Transportation Commission (490-512); Marvin Holen, President of the Board of Directors of the Southern California Rapid Transit District (SCRTD) (512-527), and Paul Taylor, Director of Bus Planning for SCRTD, who testified, among other things, about SCRTD's aim of providing feeder bus service for the train project (527-541).

Against this background, SP's contentions regarding Los Angeles County's withdrawal and Congresswoman Fiedler's letter[5] may be propertly evaluated. First, SP does not challenge Findings of Fact 7 through 11 in Decision No. 91847 or Findings of Fact 1 through 3 on page 9 of Decision No. 92862. Those findings are supported by record evidence and are therefore beyond this Court's review under Section 1757 of the Public Utilities Code. Thus, SP simply invites the Court to reweigh the evidence and to substitute its conclusions for those of the Commission. The Commission respectfully submits that the Court should decline this invitation.

Second, even after the withdrawal of Los Angeles County, other governmental entities continue to support the project. Ventura County, the Southern California Association of Governments, the Ventura County Association of Governments, the Los Angeles County Transportation Commission, and the Southern California Rapid Transit District all remain in support of the project. In this situation, it is not an abuse of discretion that the Commission declined to speculate on the significance of the election of either Supervisor Antonovich (see Decision No. 92862, at p. 8) or Congresswoman Fiedler. Whether the County withdrew because it saw an opportunity to sell its railroad cars to generate revenue for its treasury (which is specualtion), or because of the Supervisors' perception of

[5] The withdrawal of Los Angeles County is throughly analyzed in Decision No. 92862 and requires no further discussion beyond pointing to the Findings of Fact in that decision. SP is correct that the Commission did not literally discuss the letter of Congresswoman Fiedler in Decision No. 93211, which denied rehearing of Decision No. 92862. However, it may be noted here that the Congresswoman's views are at best equivocal. It may be noted, for example, that her opposition is twice qualified in the first paragraph of her letter as existing "at this time." The Congresswoman notes that the project "might be feasible" with a "proper upgrading of facilities," but this overlooks the Commission's findings, on a complete record, that the facilities which exist are adequate. The Commission's findings on every other allegation in her letter are simply contrary to her opinions. In this situation, the California Constitution entrusts the fact finding process to the Commission, not the Congresswoman. It may be noted, too, that the letter closes with further evidence of equivocation, "disapproving . . . the plan, *at the present time.*" (Emphasis added). Such letters neither merit nor require separate response in Commission decisions.

popular opinion (which is speculation) does not matter in view of the continued support of the principal sponsor of the project, Caltrans, and other local governments. That the County Supervisors may have concluded, as their resolution states, that the service is "not cost effective and would increase pollution" or not in the County's "best interest" is immaterial in view of the Commission's contrary findings of fact. The Commission, not the County, and not the local Congressional representative, is the arbiter of such factual questions. In this case the Commission assembled a voluminous record and gave the closest scrutiny to the competing contentions on each issue. The Commission respectfully submits that the Court should decline SP's invitation to have the conclusions of the County Supervisors and Ms. Fiedler substituted for the Commissioners'.

SP's argument also overlooks one solid unchanged fact, namely state funding for this project. The People of California, so to speak, have "put their money where their mouth is," and kept it there, by providing a full subsidy for this service. (See testimony of Caltrans' witness George Gray, Exhibit 9 and transcript at 277-281, and 292-296, regarding funds provided by Senate Bill 620, Stats. 1979, ch. 161). In view of this fact, it is immaterial that the County of Ventura did not want to pay for part of the project (see transcript at p. 199), which SP attempts to magnify into a demonstration of the County's "true" opinion of the proposed service's value. Despite the passage of Proposition 13, which left Ventura County without funds to pay for the service (*ibid.*), the Legislature is still willing to fund this project. This fact, which is reflected in Findings 13 and 28 through 33 in Decision No. 91847 (as finally modified in Decision No. 93211), speaks powerfully to the issue of the public's continued support for this project.

The state's funding for the project also answers SP's arguments about the possibility that federal funds will not be available in the future. The testimony of witness Gray in Exhibit 9 was simply that federal funds might be available, not that such funds were a prerequisite to the initiation of the project. Such funds were never relied on for this project. In

these circumstances, the Commission did not abuse its discretion in declining to receive SP's Exhibit H (a summary of President Reagan's economic program) or Exhibit I (a speech by the administrator of the Urban Mass Transportation Administration (UMTA)) into the record or in declining to dismiss the complaint in Case No. 10575 because of Los Angeles County's withdrawal. The adequacy of state funding makes the future existence or non-existence of federal funding irrelevant.

Public convenience and necessity is not a popularity contest, but if it were, the existence of state funding alone would attest to popular support. Public convenience and necessity is also not the product of local partisan politics or the ebb and flow of political maneuvering. It instead represents the assessment of the needs of the *entire* state by a statewide Commission charged by the Constitution to protect the interests and welfare of *all* Californians. There is no basis on which the Court can properly overturn the Commission's findings.

II. THE COMMISSION DID NOT DENY SP DUE PROCESS BY REFUSING TO RECEIVE INTO THE RECORD THE CONGRESSWOMAN'S LETTER AND NEW EXHIBITS RELATED TO POTENTIAL FEDERAL FUNDING

SP claims the Commission erred by refusing to admit into its record the letter of Congresswoman Fiedler and Exhibits H and I (attached to its Petition for Rehearing of Decision Nos. 92862 and 92863). SP claims this refusal amounts to a denial of due process, arguing that this Court is "specifically empowered to make new findings where there is a constitutional challenge to a Commission decision." These arguments are devoid of merit.

First, the opposition of Congresswoman Fiedler adds nothing to the record which was not considered when Los Angeles County withdrew as a complainant. This is obvious from a simple perusal of Decision No. 92862 and the letter itself. The equivocation of this letter has already been noted. (Fn. 5, *supra*, at p. 12). Second, as noted above, the existence

or non-existence of federal funding is completely irrelevant in view of existing and adequate state funding for the project. The testimony of witness Gray was that federal funding might become available but that it was not being relied upon. (Exhibit 9, p. 5). In these circumstances, SP's claim that it was denied due process lacks substance.

Second, this Court has already stated that Public Utilities Code Section 1760, on which SP relies, does not permit it to overturn the Commission's findings of fact even when a litigant challenges those findings on federal constitutional grounds. "The provisions of section 1760 . . . , authorizing an independent judgment on the law and the facts in cases in which an order or decision is challenged on constitutional grounds, do not authorize this court to substitute its own judgment as to the weight to be accorded evidence before the Commission or the purely factual findings made by it. [Citations]." (*Goldin* v. *Public Utilities Commission* (1979) 23 Cal. 3d 638, 653). SP's attempt to have this Court depart from this rule should be rejected, especially since SP has not provided any rationale explaining why *Goldin* is inapplicable. The material submitted was neither new nor relevant. No specific response to it was required. No due process error occurred. If this Court holds otherwise on *these* facts, it will guarantee that disgruntled litigants can endlessly prolong Commission proceedings by submitting new material *ad infinitem,* in the hope that any effort by the Commission to draw a reasonable close to its hearings will be overturned as a denial of due process. The Court should reject SP's due process claim.

III. THE COMMISSION'S LACK OF ICC CERTIFICATION UNDER THE STAGGERS ACT DOES NOT BAR AN ORDER TO SP TO PROVIDE RAIL PASSENGER SERVICE

SP argues in its "Petition for Rehearing of Decisions 92862 and 92863" (see, e.g., Exhibit D attached thereto, at pp. 4, 18 and 24) and in its "response to Caltrans' Petition for Rehearing of Decision No. 93211" (see, e.g., pp. 8 and 10) that the Commission is barred from ordering SP to provide rail passenger service because it is not certified by the ICC under the terms

of the Staggers Rail Act of 1980.[6] Since these arguments are before the Court,[7] the Commission must answer them, lest the Court conclude the Commission takes no position on this issue.

The Staggers Rail Act of 1980 does not bar the Commission from ordering SP to institute passenger train service. The certification provisions of Section 214 in Title II of the Act (49 U.S.C. § 11501, as amended) apply only to state regulation of rail freight rates. (See, e.g., 49 U.S.C. § 11501, Subd.(b)(4)(A)). The legislative history of the Staggers Act is absolutely silent on the question of whether its provisions apply to common carrier rail passenger service. There is no indication Congress intended the Staggers Act to apply to such service. Further, the complex freight rate provisions of the Act, revolving around concepts of market dominance and rate windows, are entirely inapplicable to passenger service. (See, e.g., 49 U.S.C. §§ 10701a, 10704, 10705a, 10707a and 10709).

The Commission neither believes nor accepts the proposition that the historic jurisdiction of California and other states over rail passenger service would or could be peempted by Congress without so much as a single word to that effect.

Under Article III, Section 3.5 of the California Constitution, the Commission cannot find itself divested by federal legislation of jurisdiction over any aspect of public utility service in the absence of an appellate court opinion to that effect. The Commission submits that if the Court issues a writ of review in this case, the Court should take the opportunity to

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[6] Decision No. 93211 incorrectly refers to P.L. 95-473 in providing a citation for the Staggers Rail Act of 1980. The correct citation is P.L. 96-448, October 14, 1980, 94 Stat. 1913.

rule on the Staggers Act issue, as well as to detail the responsibilities of the Commission as it attempts to comply with the spirit of Article III, Section 3.5 and with the Supremacy Clause of the federal constitution (U.S. Const., Art. VI, ¶2).

CONCLUSION

For all of the foregoing reasons, the Commission submits that SP's petition for a writ of review should be denied.

Respectfully submitted,

/s/ JANICE E. KERR
Janice E. Kerr

/s/ HECTOR ANNINOS
Hector Anninos

/s/ ANNE K. MESTER
Anne K. Mester

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Attorneys for the Public Utilities Commission of the State of California

August 14, 1981

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I am a citizen of the United States, over the age of 18 years, with business address at 5066 State Building, San Francisco, California, and am not a party to nor interested in *Southern Pacific Transportation Company* v. *The Public Utilities Commission of the State of California*, S.F. No. 24316 before the Supreme Court of California.

On August 14, 1981, in San Francisco, California, I personally deposited in the United States mail copies of the RESPONDENT'S ANSWER IN OPPOSITION TO PETITION FOR WRIT OF REVIEW, addressed as follows:

John MacDonald Smith
Carol A. Harris
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Lat J. Celmins
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Each copy was enclosed is a sealed envelope and all postage thereon fully prepaid.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ CATHY L. MAY

Cathy L. May

SUPREME COURT
FILED
Sep 3 1981
LAURENCE P. GILL, *Clerk*

Deputy

**IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA**

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

[County of Los Angeles and State of California, Real Parties in Interest]

SF NO. 24316

PETITIONER'S REPLY TO ANSWERS OF RESPONDENT AND REAL PARTY IN INTEREST

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Date Due: September 3, 1981

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IN THE SUPREME COURT
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PETITIONER'S REPLY TO ANSWERS OF RESPONDENT AND REAL PARTY IN INTEREST

TO THE HONORABLE ROSE ELIZABETH BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Southern Pacific Transportation Company ("SP") petitioner herein, hereby replies to the Answers filed by respondent Public Utilities Commission of the State of California ("Commission") and real party in interest State of California Department of Transportation ("Caltrans") and respectfully submits that its petition for writ of review should be granted.

I. SP WAS DENIED DUE PROCESS BY THE COMMISSION'S FAILURE TO EVEN CONSIDER NEW EVIDENCE DEMONSTRATING LACK OF PUBLIC SUPPORT FOR THE COMMUTER TRAINS.

The Commission and Caltrans argue in their Answers that the new evidence presented by SP showing local and Congressional opposition to the proposed Oxnard-Los Angeles commuter train service should not upset the Commission's ultimate findings of public convenience and necessity on the grounds that those findings are supported by other evidence that remains in the record. They fail utterly to refute, however, SP's contention that the new evidence, which includes the February 5 Resolution of the Los Angeles Board of Supervisors, evidence of future federal budget cuts affecting UMTA (the federal public transportation agency), and the letter from Congresswoman Fiedler opposing the commuter train service, was *not even considered* by the Commission in rendering its Decisions 92862 and 93211. It was the Commission's erroneous failure to even consider the new evidence that gives rise to SP's present claim of denial of due process.

County's February 5 Resolution, passed without dissent by its Board of Supervisors, makes explicit findings that imposition of the Oxnard-Los Angeles train service is "unwarranted at this time" and "is not cost effective and would increase pollution." Based on these findings, the Resolution concludes that ". . . it is not in the best interest of the citizens of the County of Los Angeles to continue to participate in this action and to continue to prosecute the pending Public Utilities Commission case asking for a service." It directs the County's legal counsel to formally withdraw from Case No. 10575.

Decision 92862, which granted County's motion to withdraw *ignored* the February 5 Resolution which repudiates the County's previous support for the service and which raises objections to it. Indeed, the Commission inexplicably has refused to regard County's withdrawal as a change of position even though the stated grounds for County's motion tell us that County no longer believes it is in the best interest of the people

of Los Angeles County to request an inefficient, expensive, fuel-wasteful transportation experiment. For the Commission to pretend that nothing of substance has changed, despite repudiation and withdrawal by the local political agency responsible for filing the original Complaint, is simply to ignore reality.

In its petition for rehearing of Decision 92862, SP presented a certified copy of County's February 5 Resolution and argued that gross error was committed when, in the face of the explicit language of the Resolution, the Commission refused to recognize that County now affirmatively opposes the commuter train service. That petition for rehearing was summarily denied in Decision 93211. In addition, Decision 93211 fails to discuss *any* of SP's other new evidence concerning the lack of public convenience and necessity for the service, including Congresswoman Fiedler's letter; indeed, it barely acknowledges that the issue was raised.

In its Answer to the instant petition for writ of review, the Commission puts forward various reasons why it was correct in reaffirming its earlier findings of public convenience and necessity in the face of this new evidence. These arguments attempt to play down the significance of the new evidence, but that does not excuse the Commission's failure to admit that evidence in the first place. Until faced with SP's petition for writ of review, the Commission made no attempt to reconcile its earlier findings of public convenience and necessity with the new contradicting evidence presented by SP. The Commission cannot substitute its brief here for the analysis it should have done during the proceedings below.

The Commission argues (Answer, p. 17) that this Court is not permitted to overturn the Commission's findings of fact on public convenience and necessity even when those findings are challenged by a party on constitutional grounds, citing *Goldin* v. *Public Utilities Commission*, 23 Cal. 3d 638 (1979). But what SP is challenging is the lack of *any* findings at all on what it contends is new and highly pertinent evidence.

The Commission attempts to circumvent this difficulty by arguing that the material submitted by SP with its Petition for Rehearing was "neither new nor relevant" (Answer, page 17). This statement shows a remarkable ability to ignore reality. Both the February 5 Resolution and Congresswoman Fiedler's letter are clearly of recent date and are extremely relevant to the issue of the public support for the proposed service. Likewise, the material on UMTA was unquestionably new, since it is the result of the recent change in Administration, and it is clearly relevant, since Caltrans' initial budget did in fact include provisions for UMTA monies. (Decision 91847, p. 8).

As a fallback position, the Commission argues that it *did* consider the newly presented evidence. County's Resolution, the Commission says, "was considered by the Commission prior to the issuance of Decision No. 92862" (Answer, page 6). But decision No. 92862 makes absolutely no mention of such consideration; indeed, it glaringly omits any reference to the Resolution. The Commission says that the UMTA material and Congresswoman Fiedler's letter "were not responded to in Decision No. 93211, except insofar as the Commission concluded they did not constitute good cause for granting rehearing." *Ibid)*. The Decision itself is admittedly totally silent on the subject. How, therefore, can this Court determine what the Commission's assessment of this new evidence was? It was for this very reason that Section 1705 of the California Public Utilities Code provides that:

> "... (every) decision shall contain, separately stated, findings of fact and conclusions of law ... on all issues material to the order or decision."

This Court has repeatedly held that the requirement of specific, separately stated findings is intended to enable this Court to see whether the Commission has acted arbitrarily. *California Motor Transport Co.* v. *Public Utilities Commission*, 59 C.2d 270, 274 (1963). *See* also, *Associated Freight Lines* v. *Public Util. Comm.*, 68 C.2d 243, 244 (1968). As this Court said in *Pacific Tel. & Tel. Co.* v. *Public Util. Comm.*, 62 C.2d 634, 648 (1965), Section 1705 findings "afford a rational basis for

judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily . . .".

This Court is empowered to find, and should find, that the Commission's failure to consider the new and relevant evidence presented and make findings on it was arbitrary and capricious and denied SP due process.

II. THE COMMISSION ABUSED ITS DISCRETION IN REAFFIRMING ITS FINDINGS OF PUBLIC CONVENIENCE AND NECESSITY IN LIGHT OF THE NEW EVIDENCE.

The Commission and Caltrans both argue that, despite the new evidence offered by SP, the Commission did not err in reaffirming its findings of public convenience and necessity because those findings are supported by other evidence consisting of popular support, ridership projections, state subsidies and endorsements from governmental officials and planning agencies. The Commission argues that even the presence of a real conflict of fact with respect to public convenience and necessity should not upset its findings on this issue as long as there is *some* supporting evidence contained in the record.

The cases which the Commission and Caltrans cite for this proposition are not persuasive. For example, *Los Angeles Mut. Transit Authority* v. *Public Utilities Com.*, 52 C.2d 655 (1959) holds only that the question of whether differences between a proposed and an existing service "justified" the issuance of a certificate for new service is a matter for the Commission's judgment. Presumably, if there is no justification, the findings of public convenience and necessity can be overruled by this Court. In *San Diego Etc. Ferry Co.* v. *Railroad Com.*, 210 Cal 504, 513 (1930), this Court held as to *that* case that there was "sufficient in the record to justify the decision". What SP is arguing here is that there is *not* sufficient evidence in *this* proceeding to justify a finding of public convenience and necessity. *Cal. Portland Cement Co.* v. *Public Util. Com.*, 49 C.2d 171 (1957) holds only that the Commission's findings of

fact are "generally" final, although in that case, this Court ruled that because inconsistent findings had been made as to the principal issue, all the findings of fact had to be annulled.

The cases lead to this conclusion: The Commission may have initial discretion to determine the material factors relating to public convenience and necessity as indicated in *California Motor Transport Co.* v. *Public Utilities Com.*, 59 C.2d 270, (1963), but that does not mean that this Court is forbidden from considering whether there was an abuse of that discretion, especially when, as here, that abuse rises to the level of a denial of due process. Likewise, this Court in *Pacific Tel. & Tel. Co.* v. *Public Util. Com.*, 62 C.2d 634, 647 (1965), held that a challenge to the "reasonableness" of a Commission decision is indeed appropriate, and that is certainly the challenge SP is making here.

Perhaps the point can be made this way: If the Board of Supervisors of Alpine County passed a resolution finding the Los Angeles service inadvisable, we could understand the Commission's summary dismissal of the objection. Here, however, we have an original complainant, the intended beneficiary of the proposed service, withdrawing and repudiating its earlier request after having had an opportunity to review both the adverse and beneficial aspects of the plan.

Moreover, both Caltrans' and the Commission's factual presentation is severly distorted and presents a wholly inaccurate picture of the controversy in Case No. 10575. The Commission's synopsis of the evidence conveniently ignores the evidence of lay and expert witnesses opposing the commuter train service. That evidence demonstrated, among other things, that the proposed train service will be extremely expensive to operate, with what may well be the highest per passenger public funding subsidies in the world, and that it will seriously interfere with SP's local freight service to San Fernando Valley shippers as well as disrupting long distance freight and Amtrak schedules between the Bay Area and Los Angeles. The disruption of these essential freight service, SP established, will threaten the integrity of service to major employers in the San

Fernando Valley, and will burden interstate commerce. SP's uncontradicted evidence further shows that Caltrans' ridership projections from the raw data are wildly overstated,* because the Commission assumed that a schedule which produced the best "fit" for commuters in the central business district would provide an equally good "fit" for commuters at other stations, who were expected to contribute a large proportion of the projected riders. The uncontroverted evidence showed, however, that the percent-of-potential-riders-captured falls off very sharply as the schedules depart from the normal working hours, since most people do not want to arrive at work half an hour early and stay half an hour late. The evidence further showed that, due to the necessity for daily meets between the commuter trains and Amtrak trains on SP's single track railroad, the commute service would be so subject to such persistent random delays that only dyed-in-the-wool rail buffs would want to take it.

Those testifying against the train service included shippers and local industries such as General Motors (Ex. 39, T. 980-984), Anheuser Busch (T. 1004-1012)**, Weyerhaeuser Company (T. 989-1003), Northridge Lumber Company (T. 1024-1039), Rail Chem, Inc. (T. 2144-2156) and Spencer Strathearn (T. 2158-2165), the Los Angeles Area Chamber of Commerce (Exhibit 38), the Los Angeles Taxpayers Association (Exhibit 30) and U.C.L.A. Professor George W. Hilton (T. 1989-2019) as well as SP operating officers and expert consultants.

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* SP took strong exception to Caltrans' ridership projections on the grounds that they were based on erroneous assumptions concerning the characteristics and quality of the service to be provided. Using the same base 24 hour projections as the Caltrans witness, SP's consultant, Mr. Paul Reimer calculated that Caltrans' estimates were overstated by more than 50% (Ex. 52). Moreover, Mr. Reimer estimated it would cost an astonishing $26 to $44 per passenger per day to operate the service (Ex. 51).

** The fact that the Anheuser Busch witness stated that he is not against operating commuter trains per se, as noted by Caltrans in its Answer, is immaterial—what is important is that company's unequivocal opposition to the state's efforts to impose a passenger service that will interfere with freight deliveries to its plant.

None of this was known to the County of Los Angeles when it launched the case. As the record unfolded and mounting evidence established the harm that it would cause, the exceedingly high state public subsidy per patron involved (and Los Angeles County is a primary source for state tax dollars), and the minimal value of the proposal in terms of meeting the County's transportation needs, the County quite logically concluded that *it did not want this service after all.* The Commission's refusal to change course, like a giant aircraft locked on auto pilot after the crew has bailed out, is an abdication of its responsibility towards the public that it serves.

Next, the Commission and Caltrans make the astounding claim that the expressions of the Los Angeles County Board of Supervisors and the United States Congresswoman through whose district the trains would run and who now oppose the commuter rail service, are not entitled to much weight because they come from politicians. The Commission goes so far as to intimate at page 15 of its Answer that County's Resolution and the Fiedler letter may be the "product of local partisan politics or the ebb and flow of political maneuvering," and are therefore not worthy of serious (or any) consideration. Likewise, Caltrans makes the assertion at page 9 of its Answer that the letter from Congresswoman Fiedler need not have been considered because it merely asks the Commission ". . . to speculate on the meaning of election results". The Court should ask itself how far SP would have gotten if it had objected to the statements of other public officials on similar grounds. SP would justifiably have been hooted out of the Courtroom, and the argument deserves no kinder treatment here.

The Fiedler letter, which is plain on its face,* states the Congresswoman's strong oposition to commencing the commuter rail service through her district because of the disastrous effect it would have on freight service to local industries such as

* The Commission's claim at footnote 5 of page 12 of its Answer that Congresswoman Fiedler's views are "at best equivocal" is a blatent misreading of that document. Her letter makes it absolutely clear that she opposes the imposition of the commuter rail service on SP's existing rail facilities, which the record shows, consist of primarily single track railroad without modern electronic switching operated by remote control.

General Motors which could in turn negatively impact jobs and the local economy. County's February 5 Resolution, which is also clear and unequivocal, contains specific findings that the service would be too costly and pollutive and is not needed. Neither of these documents leaves any room for speculation as to their intent or meaning. Both are sponsored by duly elected public officials who are speaking on behalf of the millions of Los Angeles area residents they represent. Caltrans' suggestion that these individuals are somehow not qualified to speak for their constituents is patently absurd and is indeed abhorent to the basic principles upon which this country's representative democracy is based.

The evidence of the County and local, federal and state political representatives was good, substantial, credible, trustworthy evidence of public convenience and necessity when it *supported* the proposed service (Decision 91847, pp. 9, 57, 70 [Finding 9]) but becomes vacuous, vague, untrustworthy, and insubstantial when it *opposes* the plan. Such inconsistency is evidence of a serious abuse of the Commission's discretion.

It is also no answer to say that the views of County and the local Congressional representative are no longer important because Sacramento has agreed to pay the entire cost of the rail project, albeit with dollars largely extracted from County taxpayers. It is well established that a finding of public convenience and necessity requires more than a showing that funding is available. Moreover, there is now a real question as to whether the state is actually willing and/or able to pay the cost of this service. The Commission says that Caltrans has "put its money where its mouth is" and has "kept it there by providing a full subsidy for this service." (Answer, p. 14). In *its* Answer, however, Caltrans states only that it is willing to "finance the deficits," and in its recent petition for rehearing of Decision No. 93211, Caltrans took strong exception to the Commission's compensation provisions, which require Caltrans to reimburse SP for all costs incurred in connection with the commuter rail service. Caltrans, it seems, unlike the Commission, still clings to the hope that SP can be persuaded—or forced—to pick up part of the costs of this unfortunate plan.

It is readily apparent that Caltrans' budget for the service, developed in 1979, is woefully inadequate to pay in 1981 dollars for the sevice once all the unanticipated costs for the service are counted—rental of two complete train sets, since County's train set is now unavailable; rental of station properties, which Caltrans thought would be free; costs of constructing and maintaining storage facilities at Oxnard, which had not been planned for; gross understatement of train crew wages because of lack of familiarity with rail wage and labor contract requirements; and the major capital costs which may be incurred in order to avoid the crippling delays which would otherwise afflict the commuter service.

Against this background, the probable loss of UTMA funding, which was counted upon to make up about 10% of the loss that Caltrans anticipated (Decision 91847, p. 8) has acquired significance, one which should not have been totally ignored.

The picture is thus not one of a "justified" new service or one that is "reasonable"; it is that of a very expensive, controversial transportation service which will serve a minimal number of people not very well. As such, the Commission has abused its discretion in ordering commencement of the service.

III. THE STAGGERS ACT PREEMPTION ISSUES HAVE NOT BEEN PROPERLY RAISED BEFORE THIS COURT, BUT IF THEY ARE CONSIDERED, THIS COURT MUST FIND THAT THE COMMISSION'S AUTHORITY TO ENTER INTRASTATE SERVICE ORDERS HAS BEEN SUSPENDED.

The California Public Utilities Commission argues (Respondent's Answer, pages 18-19) that this Commission's lack of certification under the Staggers Rail Act of 1980 (PL 96-448, October 14, 1980) has no effect upon the Commission's authority to enter the order complained of here. The Commission argues that the Staggers Rail Act of 1980 applies a federal preemption only to freight matters, and does not purport to touch passenger services.

Preliminarily, we should advise the Court that the scope and effect of the Staggers Act preemptions, for both freight and passenger service, has been assailed by a number of states, including California, in a constitutional test filed in the United States District Court for the Western District of Texas (*State of Texas, et al.* v. *United States of America, et al.*, Docket No. A-80-CA 487). Extensive briefing has already been conducted in that action, including briefing of the passenger service issue, and it is anticipated that the Texas litigation will serve as the primary constitutional challenge on this and related issues. Meanwhile, we believe that the Act is clear and explicit and holds that California, as a non-certified state under the Staggers Act, may not enter intrastate service orders, and that if it attempts to enforce an intrastate service order, such an attempt can be enjoined in federal court.

Should this Court desire to address this important issue, it would seem appropriate that further briefing would be called for from the parties so that this Court could have the full benefit of all of the arguments on this very important matter and not just the rough-and-ready treatment which is all that is possible here.

Although SP does not believe the issue is properly before this Court at this time, it might be helpful if we provided a brief background explanation of the Staggers Act preemption and explained why the California argument that passenger matters have not been preempted is fallacious and unfounded.

The plight of the railroad industry has received substantial attention in the halls of Congress and in the public press in recent years. Convinced that the railroad industry had suffered for years from excessive regulation at both the state and federal levels, Congress passed the Staggers Rail Act in 1980, designed to give the railroads new freedom from the traditional regulatory restraints, and specifically a new freedom to price their services and run their business as other major industries in this country are allowed to do. The regulatory changes involved a sweeping revision of the federal regulatory scheme, and essentially freed the railroads from being locked into providing marginal or money-losing services.

Past experience, however, demonstrated that such freedoms at the federal level could be substantially diluted by intransigent states which insisted upon the provision of deficit and marginal intrastate services which drained the resources of the railroads and precluded them from modernizing, repairing track and structures, and otherwise upgrading their physical plants to meet the challenges of the 1980's. Such state efforts in the past frequently resulted in extensive litigation before the Interstate Commerce Commission, and sometimes the courts, before the states were forced to yield. California has, at times, been a conspicuous part of that national problem, as the reported decisions of the Interstate Commerce Commission demonstrate. *California Intrastate Freight Rates and Charges,* 289 ICC 767 (1953); *California Intrastate Freight Rates and Charges,* 302 ICC 189 (1957).

California's reluctance to authorize needed increases has not been confined to the freight rate field. Taking advantage of this Court's ruling in *Southern Pacific Company* v. *Public Utilities Commission,* 41 Cal. 2d 354 (1953), that a railroad could be compelled to operate money-losing passenger services so long as operations of the company as a whole were not conducted at a loss (page 366), the Commission kept an artificial lid on commutation fares on the San Francisco Peninsula until the losses, as recently found by an Interstate Commerce Commission Administrative Law Judge, exceeded $11 million per year—all for the benefit of a limited number of California intrastate passengers on the San Francisco Peninsula. FD 28611, Southern Pacific Transportation Company—Discontinuance of Commuter Service, San Francisco-San Jose, July 6, 1979 (Mimeo Decision, page 29).

The California Public Utilities Commission's expressed belief that the Staggers Rail Act of 1980 sought to reach freight deficit problems, but did not touch passenger services, stems from a misreading of the specific language of the Interstate Commerce Act. Prior to 1978 matters pertaining to freight and passenger service were frequently separately identified and referred to in the former codification of the Interstate Commerce Act. Thus the former Act would refer to the "rates, fares, and charges" of railroad carriers (49 U.S.C. §6(1); in this

context "rates" referred to freight rates, "fares" referred to passenger fares, and "charges" referred to incidental charges which might be either freight or passenger. In the Act as recodified by P.L. 95-473, October 17, 1978, the former distinctions between freight and passenger service were eliminated, and the subjects treated together. Thus, under the recodified Act, the term "rate", which had previously had a specific meaning as identifying a freight service, was redefined to mean "rate, fare, or charge", thereby encompassing both freight and passenger activities (49 U.S.C. §10102(20)). Reference to "transportation" was broadened to encompass the movement of passengers or property; 49 U.S.C. §10102(24). Thus, when the Staggers Rail Act of 1980 spoke of "rates" and "transportation", Congress was necessarily dealing with both freight and passenger transportation as part of a single package.

In order to preclude the states from nullifying the benefits that Congress hoped to extend to the railroad industry with the freedoms contained in the Staggers Act, preemption provisions were included in the Staggers Act whereby states could only continue to exercise jurisdiction over intrastate transportation if their intrastate regulatory schemes conformed to the federal principles embodied in *Staggers*. States that thus agreed to regulate intrastate commerce on the same terms and under the same conditions as Congress intended interstate traffic to be regulated are known as "certified" states and are allowed to retain jurisdiction over intrastate transportation. States which could not or did not so qualify with the Interstate Commerce Commission were classified as non-certified states, and lost all jurisdiction over intrastate rail transportation, 49 U.S.C. §11501(b)(4)(B).

California was unable to seek and apply for certification from the Interstate Commerce Commission because the state's regulatory provisions—derived from the California constitution, from the Public Utilities Code, and such decisions of this Court as *Southern Pacific Company* v. *Public Utilities Commission, supra*—are irreconcilable with the freedoms contained in the Staggers Act, and those constraints cannot be abolished by any action which the Commission might take. California is thus an uncertified state under *Staggers*.

There is yet one further amendment to the Interstate Commerce Act accomplished by The Staggers Act which corroborates our point that states such as California have lost jurisdiction to enter orders such as that entered here. Prior to the *Staggers* amendments, 49 U.S.C. §10501(c), which governs the "general jurisdiction" of the Interstate Commerce Commission, provided:

> "This subtitle [the Interstate Commerce Act] does not affect the power of a state, in exercising its police power, to require reasonable intrastate transportation by [interstate rail] carriers . . . unless the state requirement is inconsistent with an order of the Commission issued under this subtitle or is prohibited by this subtitle."

Section 214(c)(4) of the Staggers Act added another "unless" clause to section 10501(c), so that it now provides that the Interstate Commerce Act does not affect the State's power to require reasonable intrastate transportation (and again, this means either freight or passenger services) unless "the transportation is deemed to be subject to the jurisdiction of the Commission pursuant to §11501(b)(4)(B) of this title". In other words, when the ICC is deemed to have jurisdiction over the intrastate transportation in an uncertified state (as here) the police power of that state to require "reasonable intrastate transportation" whether passenger or freight, is suspended. In this case, the California Public Utilities Commission's authority was suspended as of January 29, 1981, as found by an order of the Interstate Commerce Commission (ICC Decision in *Ex Parte* 388 served April 22, 1981).

Thus, when the California Public Utilities Commission entered its Decision No. 92863 on April 7, 1981, ordering the operation of new passenger train services, such order was a nullity, as the Commission's authority had been placed under suspension by virtue of the Staggers Act preemptions.

CONCLUSION

For all the foregoing reasons, SP submits that its petition for writ of review should be granted and a writ should issue.

Dated at San Francisco, California this 3rd day of September, 1981.

Respectfully submitted,

JOHN MACDONALD SMITH
CAROL A. HARRIS
ANN FINGARETTE HASSE
813 Southern Pacific Building
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By ANN FINGARETTE HASSE
Ann Fingarette Hasse

CERTIFICATE OF SERVICE

I, Ann Fingarette Hasse, declare that on this date I have caused a copy of the following document:

PETITIONER'S REPLY TO ANSWERS OF RESPONDENT AND REAL PARTY IN INTEREST

to be served by first class mail upon all of the parties of record in this proceeding.

Dated at San Francisco, California this 3rd day of September, 1981.

ANN FINGARETTE HASSE
Ann Fingarette Hasse

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I am a citizen of the United States, over the age of 18 years, with business address at Southern Pacific Building, One Market Plaza, San Francisco, California 94105, and am not a party to nor interested in *Southern Pacific Transportation Company v. The Public Utilities Commission of the State of California*, S.F. No. 24316 before the Supreme Court of California.

On September 3, 1981, in San Francisco, California, I personally deposited in the United States mail copies of the attached Petitioner's Reply to Answers of Respondent and Real Party in Interest addressed as follows:

Janice E. Kerr
Hector Anninos
Ann K. Mester
E. Nicholas Selby
5066 State Building
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Ronald L. Schneider
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1015-15th Street
Washington, DC 20005

Each copy was enclosed in a sealed envelope and all postage thereon fully prepaid.

I certify under penalty of perjury that the foregoing is true and correct.

LISA BERGENHOLTZ

Lisa D. Bergenholtz

INTERSTATE COMMERCE COMMISSION

DECISION

Ex Parte No. 388

STATE INTRASTATE RAIL RATE AUTHORITY —P.L. 96-448

Decided: January 25, 1982

The Commission has decided to extend for a short period the provisional certification of 36 States seeking to exercise jurisdiction over intrastate railroad rates under Section 214 of the Staggers Rail Act of 1980. However, if a State fails to file revised standards and procedures addressing in greater detail its ability and intent to exercise jurisdiction in conformance with Federal law within 60 days of notice of this decision in the Federal Register, its provisional certification will automatically expire.

BACKGROUND

We instituted this proceeding to implement Section 214 of the Staggers Rail Act of 1980, P. L. No. 96-448. Section 214 requires the States to apply to us for certification of their standards and procedures for rate regulation in order for them to retain jurisdiction over intrastate railroad transportation. *The Interstate Commerce Act requires States exercising this jurisdiction to do so consistent with Federal law.*

In our notice initiating this proceeding [45 Fed. Reg. 7457 (November 10, 1980)], we requested the States to submit sufficient information to permit us to conclude that each State intended timely to exercise its jurisdiction consistently with Federal law. We explained that we did not expect the States to submit unnecessarily detailed or complicated proposals reiterating the provisions of the statute. At the time, we anticipated no serious problems in implementing the Staggers Act certification procedures.

By the statutory deadline, January 29, 1981, 40 States filed for certification. All expressed their intention to follow the standards and procedures of the Interstate Commerce Act, as amended by the Staggers Rail Act. However, apparently due to the broad nature of our notice, the States did not clearly indicate how they would turn their intentions into standards and procedures which conform to Federal law. In fact, in several instances there were clear conflicts between State and Federal standards. See Ex Parte No. 388, *State Intrastate Rail Authority—P.L. 96-448*, 364 I.C.C. 881, 882 (1981). Nevertheless, we did not seriously question the State's sincerity in seeking certification, and we recognized difficulties in conforming to the changes required by the Staggers Act.

In our April 7, 1981 decision in this proceeding [46 Fed. Reg. 23335 (April 24, 1981)], we provisionally certified 40 States but required each State to file additional evidence regarding its standards and procedures. We have examined the States' subsequent filings and comments by other parties and find new, serious issues of substance and procedure.

We are concerned that our earlier notices, because of their general nature, may not have provided sufficient guidance. Indeed, we may have led the States to conclude that broad statements of intent to comply (accompanied by references to proposed implementation of key statutory provisions) were all that were necessary.

Our experience with petitions filed by the rail carriers under 49 U.S.C. 11501(c), and our review of the submissions and comments in this proceeding, have convinced us that more detailed guidance would be appropriate. More thorough explanations of State practice and procedure are necessary. Certain of the State submissions indicate a lack of in-depth understanding of the Federal scheme of regulation. This lack of understanding is troublesome. Once certified, a state may apply its standards and procedure for a 5-year period commencing on the date of certification. 49 U.S.C. 11501(b)(4) and (5). The Act is silent as to whether and on what terms a certification may be revoked before the expiration of the 5-year

period. Moreover, under the Act the Commission is to be the final arbiter of State action. Section 11501(c) provides only 30 days to decide a railroad petition for review of a State's final order determining the lawfulness of an intrastate rate, classification, rule or practice. Many of these petitions can be expected to involve complex legal and costing issues. Under these circumstances, it is imperative that we assure ourselves that the States are properly able to administer Federal law before we certify them.

While the most recent state filings are deficient in certain respects (discussed in detail below), we are continuing the provisional certification of 36 States. This provisional certification will expire for any State not filing with us its revised standards and procedures within 60 days. Four States—Maine, Mississippi, North Carolina, and Rhode Island—have indicated they no longer wish to regulate intrastate rail transportation and are not included in this continued provisional certification.

If in the past we have been insufficiently clear, to the extent possible we have made every effort in this decision to remove all ambiguity and to provide guidelines. We expect that those States desiring certification will be equally clear and complete in their responses.

PRELIMINARY MATTERS

A number of general issues warrant attention prior to discussing individual requests for certification.

1. South Dakota submits that neither it nor the Commission may regulate rail rates within its borders. South Dakota deregulated its intrastate rail transportation prior to enactment of the Staggers Act and has not sought certification. It notes that 49 U.S.C. §10501(b)(1) provides that the Commission is without jurisdiction to regulate wholly intrastate transportation except as expressly provided elsewhere in the Act. It reads Section 11501(b)(4)(B) as authorizing Commission regulation of intrastate transportation only where a State has unsuccessfully applied to the Commission for certification of its own

regulatory authority. From this, South Dakota argues that regulation by the Commission may be substituted for regulation by a State only where that State seeks to regulate intrastate rates but is denied certification. The result of this analysis would be no regulation of intrastate rates in South Dakota.

We agree with this position. We believe Congress, in enacting the Staggers Act, did not intend to extend regulation particularly where it is neither sought nor desired. Were we to regulate rates in a State which had neither regulated in the past, chose not to do so in the future, or had not applied for certification, we would be contravening the intent of Congress.

We do not believe we should be imposing regulation where none existed or where a State does not wish it. We, therefore, have concluded that—where a State has not regulated or has deregulated rail intrastate transportation, did not seek certification, and does not wish to regulate—we may not exercise jurisdiction over its intrastate rates. However, where a State seeks to have the Commission regulate intrastate transportation, we will accede to the State's request without requiring the State to go through the exercise of filing an intentionally deficient request for certification. Where a State has sought certification and has been denied, we are required by statute to regulate its intrastate rates. If the State does not wish our regulation, it must so notify us. Notice of a desire to abandon intrastate rate regulation will supersede our denial of certification, and we will refrain from regulating the rates within its borders. Where a State has sought certification and has been provisionally or fully certified but then decides to abandon regulation, it must inform us whether or not it wishes us to regulate its intrastate rates. No barriers will be erected to inhibit a State from requesting the institution or termination of our regulation of intrastate transportation, regardless of whether a State is reversing a former position.

2. In the preceding section, we have concluded that a State may choose to have its intrastate rail transportation go unregulated. Consistent with that approach, we believe that if a state chooses to regulate intrastate transportation, it should be

permitted to determine the level of regulation it will engage in, so long as the federal scheme of regulation is regarded as the maximum level of regulation that may be imposed on intrastate rail operations. For example, a State may increase the burden on protestants, reduce notice periods for rate changes, or increase the market dominance thresholds if it determines that this level of regulation is more consistent with its regulatory ability and/or is sufficient to protect shipper interests within the State.

3. Many States indicated their intention to commence proceedings under Section 229 of the Staggers Act. Under that section, an existing rate had to be challenged by a complaint filed within 180 days (i.e., March 30, 1981) of the effective date of the Act (October 1, 1980). A question has been raised as to whether the States may handle these cases. It is argued that, as Section 229 is not part of the Act itself and the States are to regulate according to the Act, there is no authority for intrastate Section 229 cases. We disagree.

If the States are to administer the other Staggers Act provisions, intrastate base rates must be reasonable. By enacting Section 229, Congress recognized that some rates then in effect (including some intrastate rates) might not have been reasonable. Section 229 thus afforded shippers a mechanism to test base rates, and we do not believe that Congress intended to insulate intrastate base rates from such challenge.

Complaints under Section 229 were required to be filed within 180 days of enactment of the Staggers Act, and in our view that limit applies to intrastate base rate challenges as well. Therefore, the States may decide those intrastate base rate complaints that were filed by March 30, 1981. Moreover, many shippers protected themselves by filing such complaints both with us and with States. We will dismiss those complaints filed both with us and with the States; the States should decide them in the first instance. Those intrastate complaints which were filed only with us will be sent to the appropriate States for disposition.

We have also been requested to conduct joint hearings with the States where related inter- and intrastate rates have been challenged. Unfortunately, we lack the staff and financial resources to do so.

4. Section 11501(d)(1)(B) provides that, upon application, the Commission has exclusive authority to prescribe an intrastate rail rate when a State does not act finally on a rate change by the 120th day after it was filed.[1] Yet, Section 207 of the Staggers Act directs that investigation and suspension proceedings must be completed within 5 months after the rate was to become effective. (An extension to 8 months is also available.) The States generally propose to be governed by the timing requirements of Section 207 rather than the 120-day period. That is, all investigations or suspensions of rates undertaken by the States consistent with substantive Federal law would be disposed of within 8 months of the original proposed effective date of the rate.

Generally, we agree that the States are bound by the same statutory limits that apply to our disposition of complaints, 49 U.S.C. 10327, and investigation and suspension proceedings, 49 U.S.C. 10707. Thereafter, we have 30 days from filing to decide a railroad petition to review a State's final order. An exception to this approach is carved out in 49 U.S.C. 11501(d) which applies in instances where a carrier "files with an appropriate State authority a change in an intrastate rate, or a change in a classification, rule, or practice that has the effect of

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[1] A literal reading of Section 11501(d)(1) might lead to the conclusion that exclusive jurisdiction rests with the Commission automatically upon a State's failure to act by the 120th day. Subparagraph (d)(2), however, indicates that such jurisdiction vests only upon application to the Commission. This Interpretation becomes clear upon examination of the predecessor provision—49 U.S.C. § 13(5) (1976)—which provided that "[t]he Commission shall have exclusive authority, *upon application to it,* to determine and prescribe intrastate rates if the requisite conditions are met. (Emphasis supplied.) Former 49 U.S.C. § 13(5) was restated as (former) 49 U.S.C. § 11501(b) by the Act of October 17, 1978, Pub. L. 95-443, 92 Stat. 1337. Section 3(a) of that act explicitly provided that the restatement "may not be construed as making a substantive change in the laws replaced." 92 Stat. 1466. Section 214(b) of the Staggers Act merely redesignated (former) Section 11501(b) as (current) Section 11501(d).

changing an intrastate rate, that adjusts the rate to the rate charged on similar traffic moving in interstate or foreign commerce . . ." In these limited circumstances, we are required to accept jurisdiction after 120 days if a State instituted a proceeding to review the lawfulness of a tariff matter designed to equalize disparate interstate and intrastate rates on the same traffic, and a carrier has applied to us for an intrastate rate prescription because the State has not acted with finality on the change by the 120th day after it was filed. We will then prescribe a rate consistent with (1) the standards of 49 U.S.C. 11501(a) and 10701 et seq., and (2) the time frames of 49 U.S.C. 10707.

THE CERTIFICATION REQUESTS AND COMMENTS

We find that additional information is necessary to certify unconditionally the States who have requested it, and we will give the States an opportunity to provide this information. As explained above, we will be specific in the type of information we require to avoid the problems we have seen to date. Accordingly, the following sections of this decision clarify what we wish to receive from the States, together with concrete examples of the problems we see in their current submissions. The outline in the appendix to this decision is intended to provide the States with further guidance in the reformulation of their submissions. It is important to recognize, however, that the appendix may not cover all of the necessary substantive areas. We offer it in a spirit of cooperation and in an effort to remove past ambiguity; it is not intended for total reliance or for use as the outline for subsequent submissions.

One widespread deficiency in the filings was a lack of information regarding State procedures. Although the Act requires the submission of both *standards* and *procedures,* only Texas and West Virginia recognized the importance of *procedures* and discussed them in detail. (While West Virginia submitted a copy of its rules of practice, its rules were adopted before the Staggers Act; they do not explain how West Virginia

proposes to implement that Act and do not integrate procedures with standards.) Thus, we stress the importance of the States including an integrated explanation of their procedures as well as their standards in their next filings.

Basically, the submissions may be divided into 3 groups: (1) those that merely adopt the Staggers Act or otherwise contain only very general statements; (2) those that include considerably more details as to standards; and (3) those which stress how procedure affects substantive regulation (i.e., Texas).

1. *States which merely adopted the Staggers Act.* Colorado, Florida, Idaho, Illinois, Indiana, Louisiana, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Utah, Washington, Wisconsin and Wyoming have submitted very general statements doing little more than adopting the Staggers Act. Some of these statements refer to certain limited statutory provisions, such as the 20-10 day notice requirement for rate increases and decreases. However, these submissions tell us nothing, for example, about whether the State would suspend on its own motion or only upon protest after the protestant has made the requisite showing under 49 U.S.C. 10707. They fail to demonstrate an understanding about key statutory provisions such as jurisdictional levels, the various burdens of proof, or the necessity for finding market dominance before prescribing maximum reasonable rates. They are silent on standards for prescribing rates, as well as the treatment of contract rates and recyclable materials. For the most part, these submissions evince no awareness of the exemption authority, surcharges and joint-rate cancellations, treatment of distinct rail services and the law governing discrimination, rate flexibility, or the promotion of revenue adequacy. Most of these submissions do not even acknowledge that the States have lost jurisdiction over general rate increases, inflation-based rate increases, and fuel adjustment surcharges. In addition to these omissions, some States have compounded the problems by adopting provisions that are directly contrary to Federal law.

Colorado, Florida, Oregon, Utah and Washington, for example, require extensive cost and other evidentiary prejustification of all rates filed. This violates the rail transportation policy of 49 U.S.C. 10101a which is directed at reducing regulatory control. It also stifles innovation and contravenes the spirit of 49 U.S.C. 11701a, which is intended to encourage rate flexibility. That Section provides that, unless a rate specifically violates a particular provision of the Act, "a rail carrier . . . may establish any rate for transportation or other services provided by the carrier." (Emphasis supplied). Absent a compelling showing that it would be consistent with Federal law, a State may not require a carrier to prejustify rates. The party opposing the rate must demonstrate that it may violate a provision of the Act before the proponent can be expected to defend it. See 49 U.S.C. 10707. Utah forbids refiling for a year once it has ruled upon the lawfulness of a rate. There is no similar Federal provision.

Florida, Illinois, Michigan, Washington, Wyoming and Oregon purport to be able to suspend on their own motion, a power denied this Commission. See 49 U.S.C. 10707(c). Florida does not mention the term market dominance, has established no standards or time period to determine whether market dominance exists, and includes no reference to jurisdictional thresholds, revenue adequacy, or federal standards for maximum rate reasonableness. It requires overly broad disclosure of contract rates, provides that contract rates shall not unfairly discriminate (as a broad prohibition, inconsistent with Federal law), and fails to impose the stringent Federal threshold burden upon a protestant. It allows protest upon a showing of "substantial interest," a term it does not define, and purports to have jurisdiction over general rate increases, even though that jurisdiction has been removed by the Staggers Rail Act. The Florida railroads point out many more defects in its submission.

Contrary to 49 U.S.C. 10701a(c)(3)(B), which places the burden of proof upon a complainant, Pennsylvania places the burden upon the railroads in a complaint case. Illinois by "temporary" order (minimum time—120 days) and without a

hearing, asserts jurisdiction immediately to reduce rail rates. This Commission has no similar power. Minnesota insists that all railroads shall have the same classification for each commodity. Under the Act, different railroads are allowed (and, in fact, encouraged) to charge different rates for the same commodity. Finally, Illinois, Ohio, and North Dakota state that they will follow our standards and procedures only so long as they deem them appropriate to rail regulation in their respective States. This does not coincide with an intent faithfully and accurately to administer Federal standards and procedures to intrastate rail transportation.

More examples could be given but are not necessary. It is obvious that under these circumstances we may not unconditionally certify these States.

2. *States which provided more detailed Statements.* Alabama, Arkansas, Georgia, Iowa, Kansas, Missouri, Kentucky, Maryland, Montana, Nebraska, New Mexico,[2] Oklahoma, South Carolina, Tennessee and Virginia devoted considerable effort to their submissions. They reflect the basic provisions of the Staggers Act and adopt our Staggers Act rulemakings. However, the Interstate Commerce Act contains more than the Staggers Act amendments. While these submissions indicate an intent to comply, they are incomplete. Moreover, they fail to reflect Federal law in certain respects.

Among the primary purposes of the Act is the promotion of railroad revenue adequacy by encouraging competition and allowing carriers the rate freedom to compete in the marketplace. To this end, as discussed earlier, Section 10701a provides that every rate filed is reasonable unless it contravenes a specific provision of the Act. This provision indicates a Congressional purpose to encourage flexibility in rate filing. Yet, Montana provides that every rate increase must be prejustified with testimony and exhibits. Prejustification is contrary to rate flexibility and seriously impairs the ability of the railroads

[2] We accept New Mexico's late-filed statement.

to respond to market forces.[3] Nebraska requires prior approval by its Public Service Commission before a rate change can be put into effect. This is also contrary to rate flexibility and conflicts with the Federal requirement that increases go into effect on 20 days' notice and decreases on 10 days' notice. Furthermore, State sponsored publication of rate changes beyond the ordinary tariff filings only serves to multiply and prolong proceedings while detracting from ratemaking flexibility and railroad revenue adequacy.

The above defects are also coupled with a complete absence of detailed procedures which would assure us that, in their day-to-day operations, these States would correctly administer the Act. Under these circumstances, we cannot unconditionally certify them.

3. *The Procedural Submission of Texas.* Unlike the previously discussed submissions, Texas filed a detailed explanation of procedures. Texas submitted an explicit procedural statement reflecting its day-to-day operations and setting forth exactly how it proposes to handle the rate cases coming before it. It described how a case would arise, and detailed its notice requirements as well as the consequences of defective notice. It explained how a proceeding is commenced, how evidence is filed, and how it makes a decision whether to suspend or investigate. It spelled out its evidentiary guidelines, set forth the threshold showing to be made in suspension cases and the burden of proof in both suspension and complaint proceedings. It presented its protest and complaint procedure and its standards for deciding suspension and complaint cases, including its jurisdictional criteria. It described how proposed decisions are issued and then reviewed its appellate process.

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[3] In Docket No. 38640, *Petition of Florida Rail Carriers to Review Act of Florida Public Service Commission on Rejecting Tariff Filings* (not printed), served July 21, 1981, we stated that there may be minimum filing requirements which would not violate the Staggers Act and that the States may tailor their standards to meet their own needs. However, Montana's requirement that "supporting testimony and exhibits" must accompany tariff filing (even if only to determine jurisdiction) places an undue burden on the railroads and directly violates the Interstate Commerce Act.

The Texas submission is a thorough, step-by-step manual of standards, practice, and procedure. Unfortunately, the Texas submission contains certain elements that are inconsistent with Federal law. It provides for suspension on its own motion, contrary to 49 U.S.C. 10707(c)(1). It states that its jurisdiction is coextensive with ours. This is incorrect; for example, Texas no longer has jurisdiction over general rate increases, inflation based increases, and fuel adjustment surcharges. In its submission, Texas also requires excessive disclosure of contract rates. Its insistence that every term which would affect the economic or monetary cost of rail transportation must be disclosed could destroy the confidentiality of contracts and chill negotiations between carriers and shippers, contrary to 49 U.S.C. §10713. The essential terms should be related to and limited by the relevant standards of lawfulness.

We caution the States not to copy the Texas submission because, in addition to the problems outlined above, the railroads have made a number of criticisms in which we find merit. Not the lease of these is that, in §§5.553(d)(2)(c)(ii), Texas would allow the finding of an unreasonable rate without regard to jurisdictional limitation or the finding of market dominance. Its prohibition against rate refiling in less than 90 days is also unduly restrictive and is absent in Federal law. This and the other issues raised by the railroads should be addressed by the States.

Nevertheless, the Texas filing should be the prototype for the States when they submit their revised standards and procedures. That is, they should not merely adopt our major Staggers Act rulemakings, set forth their criteria for deciding suspension and complaint cases[4] and reflect the Interstate Commerce Act as a whole. Rather they should also present us with a step-by-step, detailed outline of their organization, day-to-day procedures, and practices.[5] As the Texas example demonstrates, only in this way will we have sufficient information before us, and in complete enough detail, to be able to find that each State will accurately administer the Act.

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[4] Including the threshold showing which must be made before suspension can take place, jurisdiction, burden of proof and evidentiary criteria.

[5] A State may wish to track a rail carrier tariff filing through the State agency's regulatory mechanism to determine if the results of each step conform to Federal requirements.

CONCLUSIONS

Railroads and individual parties have recommended that specific States either be certified outright or have their conditional certification continued. We have not premised this decision on those recommendations. We may not rely simply on hopes or beliefs that a State will implement Federal law to justify the grant of a 5-year certification. This is apparent to us because we have already been required, through Section 11501(c) petitions, to correct the actions of several of the States. Colorado and Indiana have attempted to exercise jurisdiction over general increases. Indiana has purported to suspend a railroad rate increase *after* the tariff had become effective and placed the burden of proof upon the railroad in a complaint case. Washington has recently found a rate unreasonable without first finding market dominance and has suspended a rate without considering whether the protestant had met the requirements imposed by Federal law. Florida has imposed a 30-day notice requirement and has required elaborate prejustification for rate filings. In our prior decision in this proceeding, we also noted grave questions raised by a number of railroads about some of these States as well as about Wisconsin, Louisiana, Ohio, and West Virginia. We have not yet refused to certify a State. However, each time we have corrected a State's action, we have promised to look very closely at that State's request for certification.

The Florida railroads have vigorously sought to prevent Florida's certification, arguing that Florida does not intend to adopt the standards and procedures required by Staggers. However, Florida has stated its intention to administer its law in accordance with the philosophy of the Staggers Act. It has submitted more information than many other States which we are allowing to refile, and it would be inappropriate to discontinue its provisional certification while continuing theirs.

We will continue to make every effort to assist the States in meeting their responsibilities under the new law. We remain confident that those States which desire to be certified will soon perfect that status. We also expect that, pending final decision on the further submissions, State actions will reflect the analysis in this decision.

Each State listed below is certified provisionally as having standards and procedures (including timing requirements) which permit it to exercise jurisdiction over intrastate railroad transportation in accordance with Federal law. Each certification will become final and unconditional only if, after examining the State's further standards and procedures filing, we decide that the proposal conforms to Federal law.

Alabama	Maryland	Oklahoma
Arkansas	Michigan	Oregon
Colorado	Minnesota	Pennsylvania
Florida	Missouri	South Carolina
Georgia	Montana	Tennessee
Idaho	Nebraska	Texas
Illinois	New Hampshire	Utah
Indiana	New Jersey	Virginia
Iowa	New Mexico	Washington
Kansas	New York	West Virginia
Kentucky	North Dakota	Wisconsin
Louisiana	Ohio	Wyoming

Each provisional certification will expire 60 days from the date of Federal Register publication of notice of this decision unless prior to that date the State files standards and procedures which confirm its intention to exercise its jurisdiction in conformance with Federal standards. Railroads and other interested persons may then file comments up to 20 days later.

Maine states that it no longer seeks certification. Mississippi, North Carolina and Rhode Island have chosen not to refile. These States will lose jurisdiction to regulate intrastate rail transportation on February 8, 1982. There will then be 14 States (including these four) and the District of Columbia that did not seek certification and have lost all jurisdiction to regulate intrastate rail transportation.[6] These States should inform us by March 10, 1982 if they wish us to assume intrastate regulation. In the absence of such indication, we will not assert jurisdiction.

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[6] The States are Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Maine, Massachusetts, Mississippi, Nevada, North Carolina, Rhode Island, South Dakota, and Vermont.

A copy of this decision will be served on the Governors, public service commissions and the transportation committees in the legislatures of each State. It will also be available for inspection in the Office of the Secretary, Interstate Commerce Commission. Notice of this decision will also be provided by Federal Register publication.

This decision does not significantly affect the quality of the human environment or conservation of energy resources.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Gresham and Clapp. Commissioner Gresham concurred with a separate expression.

JAMES H. BAYNE
ACTING SECRETARY

(SEAL)

COMMISSIONER GRESHAM, concurring:

The States should be aware that the appendix to this decision is incomplete. As the decision cautions, the appendix should not be viewed as a minimum standard which can be adopted without further analysis. Total reliance on the appendix may, in fact, preclude certification.